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Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX., PETITIONERS,

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION,
LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 21, 1955

CERTIORARI GRANTED MAY 3, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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[fol. a-1]

[Caption omitted]

[fol. 2]

**IN THE SECOND JUDICIAL DISTRICT COURT FOR
THE PARISH OF BIENVILLE, STATE OF LOUISI-
ANA**

ORIGINAL PETITION

To the Honorable Judges of the Second Judicial District Court in and for the Parish of Bienville, State of Louisiana:

The petition of B. Clinton Watson and of Mrs. Ruth S. Watson, both of the full age of majority and residents of Bienville Parish, Louisiana, with respect, represents:

1

That petitioners are husband and wife respectively;

2

That Employers Liability Assurance Corporation, Ltd., is a foreign insurance corporation authorized to do and actually doing business in the State of Louisiana;

3

That said Employers Liability Assurance Corporation, Ltd., made defendant herein, is justly and truly indebted unto petitioner, Mrs. Ruth S. Watson, in the full sum of Fifty Thousand and no/100 (\$50,000.00) Dollars, and unto petitioner, B. Clinton Watson, in the full sum of Twenty-Five Thousand Eight Hundred Twenty-Seven and 42/100 (\$25,827.42) Dollars;

4

That said amounts are due unto petitioners by said defendant for damages as will be particularized hereinafter arising out of the use of a product known as "Toni Home Permanent" and the injury to petitioner, Mrs. Ruth S. [fol. 3] Watson, thereby;

5

That said defendant herein did, prior to November 9th, 1951, execute and deliver unto the Toni Company, a division of Gillette Safety Razor Company of Chicago, Illinois, a policy of liability insurance insuring and protecting said company from all acts of negligence on its part and agreeing to pay on its behalf any and all amounts awarded to any person for damages because of any act of negligence on its part, either of commission or omission, which said policy of insurance was in full force and effect on November 9, 1951;

6

That on or about the 9th day of November, 1951, petitioner, Mrs. Ruth S. Watson, did purchase from Morgan & Lindsey Company, Arcadia, Louisiana, a new "Toni Home Permanent" set for the retail price of \$1.22, including tax, prepared, made and manufactured by said Toni Company;

7

That said Morgan & Lindsey Company was and is a retail outlet for the sale and distribution of the products manufactured and distributed by said Toni Company, particularly of the "Toni Home Permanent" sets;

8

That after acquiring said "Toni Home Permanent" as aforesaid petitioner, Mrs. Ruth S. Watson, proceeded to apply the same in strict accordance with the set of directions accompanying and forming a part of the same, and in [fol. 4] complete accord therewith;

9

That as a result of the application and use of said "Toni Home Permanent," petitioner, Mrs. Ruth S. Watson, became seriously and desperately ill;

10

That on the morning of November 10, 1951 following the use and application of said "Toni Home Permanent" peti-

tioner, Mrs. Ruth S. Watson's scalp, shoulders and arms began to itch considerably and broke out in red, disfiguring bumps as did her head, which itching and bumps increased markedly and they spread over her entire body, from the top of her head to her ankles and she was entirely covered with large, swollen, red areas accompanied by severe itching;

That petitioner, Mrs. Ruth S. Watson, consulted a physician who made test, placing her on a strict diet and prescribed Linnit Starch baths;

12

That as a result of the use of said "Toni Home Permanent" petitioner, Mrs. Ruth S. Watson, ever since the application thereof, has had her entire body covered with red and swollen areas with much itching accompanied by the loss of much strength and energy;

13

That as a further result of the use of said "Toni Home Permanent" petitioner, Mrs. Ruth S. Watson, was immediately required to cease work, she having heretofore earned [fol. 5] Eighteen & No/100 (\$18.00) per week as a sales clerk in a store and has been unable to work or carry on her usual activities since;

14

That petitioner, B. Clinton Watson, was required to expend for the use and benefit of his said wife the following sums:

Browning Clinic	\$181.00
Boyce Clinic	9.50
Arcadia Hospital	35.00
(Dr. A. E. Ussery)	
Peyton Drug Company (Drugs)	10.00
New Arcadia Drug Store (Drugs)	50.00
Total	\$285.00;

15

That additional medical treatment will be required which petitioners estimate at One Thousand and no/100 (\$1,000.00) Dollars;

16

That petitioners have been informed and believe and upon such information and belief allege that among other ingredients of said "Toni Home Permanent" is a chemical called thiogloycomin, which is highly detrimental to and dangerous to human beings;

17

That petitioner, Mrs. Ruth S. Watson, forty-two (42) years of age and her life expectancy is 26.22 years;

18

That petitioner, B. Clinton Watson, shows that he has been damaged as follows:

[fol. 6] a. Doctors bills to date	\$ 225.50
b. Medical supplies to date	60.00
c. Estimated future medical expense for his wife	1,000.00
d. Loss of earnings of his wife at \$18. per week for 26.22 years	24,541.92;

19

That petitioner, Mrs. Ruth S. Watson, shows that she has been damaged and injured in the fall amounts and for the following reasons, to-wit:

a. Pain and suffering, physical and mental, past, present and future	\$40,000.00
b. Permanent injury to her body, with accompanying embarrassment and humiliation	10,000.00;

20

That said Toni Company is in complete possession of all knowledge of the manufacture, ingredients and effects of

said "Toni Home Permanent", the manner of the manufacture thereof and the materials used therein, and therefore the doctrine of *res ipsa loquitur* applies in this case, which doctrine petitioners specially plead in addition to all other facts and matters herein alleged;

21

That petitioners desire and are entitled to have this case tried by a jury as to all issues;

Wherefore, petitioners pray that the said Employers Liability Assurance Corporation, Ltd. be duly served through the Secretary of State of Louisiana with a copy [fol. 7] of this petition and cited to appear and answer the same; that after all legal delays and due proceedings had there be judgment herein in favor of petitioners and against said Employers Liability Assurance Corporation, Ltd. as follows: in favor of petitioner, B. Clinton Watson in the full sum of Twenty-Five Thousand Eight Hundred Twenty-seven & 42/100 (\$25,827.42) Dollars and in favor of petitioner, Mrs. Ruth S. Watson, in the full sum of Fifty Thousand & No/100 (\$50,000.00) Dollars, all with five (5%) per cent per annum interest on said sums from date of judicial demand until paid and all costs of this suit;

Petitioners further pray that this case be tried by a jury as to all issues;

Petitioners further pray for all necessary orders and decrees and for full, general and equitable relief.

(Sgd.) Luther S. Montgomery, 1305 Slattery Building, Shreveport, Louisiana. Lunn, Irion, Switzer, Trichel & Johnson. By (Sgd.) Richard H. Switzer, 1305 Slattery Building, Shreveport, Louisiana, Attorneys for Petitioners.

[fol. 8] *Duly sworn to by Richard H. Switzer. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF
LOUISIANA, SHREVEPORT DIVISION

Civil Action No. 3700

B. CLINTON WATSON, et ux.

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED

PETITION FOR REMOVAL—Filed April 16, 1952

To the United States District Court for the Western District
of Louisiana, Shreveport Division:

[fel. 9] Your petitioner, The Employers Liability Assurance Corporation, Limited, a corporation, respectfully shows:

1

That on the third day of April 1952, B. Clinton Watson and Mrs. Ruth S. Watson, filed an action in the Second Judicial District Court, in and for the Parish of Bienville, State of Louisiana, against your petitioner as the sole defendant, said action being entitled "B. Clinton Watson et ux. v. Employers Liability Assurance Corporation, Ltd.", bearing docket No. 14,459 of said State Court.

2

That a citation and certified copy of plaintiffs' petition setting forth the claim for relief upon which the action is based was served upon your petitioner through the Secretary of the State of Louisiana on the 7th day of April 1952; that the time within which your petitioner is required to file this petition for removal in order to remove this cause from the said State Court to this Court has not yet expired.

3

That the said action is one of a civil nature, over which the district courts of the United States have original jurisdiction; the said action having been brought by the plaintiffs against your petitioner for damages for alleged per-

sonal injuries received by Mrs. Ruth S. Watson and for medical expenses and loss of earnings of her husband, B. Clinton Watson.

4

That the matter in dispute exceeds the sum of \$3,000.00, exclusive of interest and costs; the suit being for the sum of [fol. 10] \$25,827.42 for plaintiff, B. Clinton Watson, and for the sum of \$50,000.00 for plaintiff, Mrs. Ruth S. Watson, as will more fully appear from plaintiffs' petition, a certified copy of which is hereto attached and made a part hereof.

5

That, at the time of the commencement of this action and since that time, the plaintiffs, B. Clinton Watson and Mrs. Ruth S. Watson, were, and are now, each citizens and residents of the State of Louisiana and of the Parish of Bienville, Louisiana and your petitioner, The Employers Liability Assurance Corporation, Limited, the only defendant in this action, was, and still is, a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain, having its home office at London, England, and was, and is, a citizen thereof and a non-resident of the State of Louisiana; that the controversy is, and at the time of the commencement of this action was, between citizens of the State of Louisiana and a citizen or subject of a foreign state.

6

That your petitioner files herewith a bond with good and sufficient surety for paying all costs and disbursements incurred by reason of these removal proceedings, if this Court shall hold that the action was not removable or improperly removed thereto.

7

That your petitioner files herewith all process, pleadings and orders served upon it in this action.

Wherefore, your petitioner prays that this action be removed from the State Court to this, the United States Dis-

[fol. 11] trict Court, in and for the Western District of Louisiana, Shreveport Division.

Dated: April 16th, 1952.

Cook; Clark & Egan, (Sgd.) by Benjamin C. King,
Attorneys for the Employers Liability Assurance
Corporation, Ltd., 1500 Commercial Bank Building,
Shreveport, Louisiana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AND AMENDED COMPLAINT—Filed April 18,
1952

Now into Court, through undersigned counsel, come B. Clinton Watson and Mrs. Ruth S. Watson, complainants herein and hereby amend and supplement their original complaint in this cause in the following respects:

1

That they adopt all of the allegations of their original complaint except as it may be herein modified;

2

That the Toni Company referred to in their original complaint is a department or a portion of Gillette Safety Razor Company, a Delaware Corporation, not authorized to do business in Louisiana;

3

That said Gillette Safety Razor Company, although not authorized to do business in Louisiana, is actually and has [fol. 12] been for some years doing business in Louisiana and maintains its Southern Division in the City of New Orleans, Orleans Parish, Louisiana, at 521 International Mart Building, said City;

4

That prior to the accident complained of in complainants' original complaint, defendant, Employers Liability Assur-

ance Corporation, Ltd., had issued its policy of liability insurance unto said Gillette Safety Razor Company insuring it and its Toni Company Department all as set forth in Article 5 of their original complaint filed herein;

5

That said Gillette Safety Razor Company should be served with certified copies of both the original and this supplemental complaint as required by law;

6

That complainants amend Article 20 of their original complaint by adding thereto Gillette Safety Razor Company along with the Toni Company;

Wherefore, complainants pray that this supplemental and amended complaint be allowed; that after all legal delays and due proceedings had, there be judgment herein in favor of complainants and against Gillette Safety Razor Company and Employers Liability Assurance Corporation, Ltd., in solido, in the sum of Twenty-Five Thousand Eight Hundred Twenty-seven & 42/100 (\$25,827.42) Dollars in favor of complainant, B. Clinton Watson, and in the sum of Fifty Thousand & No/100 (\$50,000.00) Dollars in favor of complainant, [fol. 13] Mrs. Ruth S. Watson, together with legal interest thereon from date of judicial demand until paid and all costs of this suit;

They further pray for trial by jury on all issues of this cause;

They further pray that Gillette Safety Razor Company be made a party defendant hereto and that certified copies of the original complaint and this supplemental and amended complaint be served on said defendant in accordance with law;

They further pray for all necessary orders and decrees and for full, general and equitable relief.

(Sgd.) Luther S. Montgomery, Lunn. Irion, Switzer,
Trichel & Johnson, by Richard H. Switzer, At-
torneys for Complainants.

CERTIFICATE OF SERVICE—(Omitted in Printing)

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

OBJECTION TO ALLOWANCE OF SUPPLEMENTAL AND AMENDED
COMPLAINT AND ALTERNATIVE MOTION TO DROP THE GIL-
LETTE SAFETY RAZOR COMPANY AS PARTY DEFENDANT—Filed
April 28, 1952

Defendant, The Employers' Liability Assurance Corpo-
ration, Limited, with respect shows:

1

That this action was filed by complainants on April 3, 1952 against The Employers' Liability Assurance Corporation, Limited, as insurer on a policy of public liability insurance of The Toni Company, a division of the Gillette Safety Razor Company, pursuant to the provisions of Section 655 of Title 22 of the Louisiana Revised Statutes of 1950, as amended.

2

That the complainants, having elected to proceed in a direct action against the insurance company alone, have no right to join the assured under said policy of public liability insurance, Gillette Safety Razor Company, as a defendant in this action, and your appearer objects to the [fol. 15] allowances of the supplemental and amended complaint.

3

In the alternative, your defendant shows that Gillette Safety Razor Company should be dropped as a party defendant.

Wherefore, your defendant, The Employers' Liability Assurance Corporation, Limited, prays that its objection to the allowance of the supplemental and amended complaint, seeking to join Gillette Safety Razor Company as a defendant, be sustained.

In the alternative, it prays that Gillette Safety Razor Company be dropped as a party defendant.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King,
Attorneys for Defendant, The Employers' Li-
ability Assurance Corporation, Limited, 1500 Com-

mercial National Bank Bldg., Shreveport, Louisiana.

Certificate of Service—(omitted in printing).

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

MOTION OF THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, TO DISMISS AND PLEA OF UNCONSTITUTIONALITY—Filed April 28, 1952

The Employers' Liability Assurance Corporation, Limited, defendant, respectfully shows:

1

Defendant is an insurance corporation organized under the laws of the Kingdom of Great Britain, authorized to do and doing business in the State of Louisiana.

2

The policy of insurance referred to in Article 5 of the complaint herein, the existence of which is the sole basis of the asserted cause of action of the complainants, was issued and delivered to the Gillette Safety Razor Company in Boston, Massachusetts, and a copy thereof was delivered to The Toni Company in Chicago, Illinois. A certified copy of said policy of insurance is hereto attached and herein incorporated, as well as affidavit of F. H. Close.

3

The policy of insurance referred to in the preceding article contains the following provisions:

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment

[fol. 17] against the insured after actual trial or by written agreement of the insured, the claimant and the company:

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability."

"Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes."

4

That the amount of the obligation of the assured, under said policy, if any obligation there be, to complainants has never been determined by judgment after trial, or by written agreement of the assured, the complainants and the defendant.

5

That under the Legislative Acts and jurisprudence of [fol. 18] the States of Massachusetts and Illinois, the provisions of the insurance contract quoted in Article 3 hereof are valid and a direct action against defendant prior to the determination of the assured's obligation either by judgment against the assured after actual trial, or by written agreement of the assured, the complainants and the defendant is prohibited.

That full faith and credit must be given to the aforementioned insurance contract and particularly to the provisions thereof above quoted, and to Legislative Acts and jurisprudence of the States of Massachusetts and Illinois, and, therefore, complainants are without the right to sue defendant as a result of the accident described in the complaint and supplemental and amended complaint herein.

7

That failure to give full faith and credit, and failure to enforce the provisions of the insurance contract above

quoted, would violate Section 1, Article 4 and Section 10, Article 1, and Section of the Fourteenth Amendment of the Constitution of the United States and Section 15 of Article 4 of the Constitution of the State of Louisiana — in that such action would:

(a) Impair the obligation of the defendant's contract with The Toni Company.

(b) Deny to defendant its right to have the Courts of Louisiana and the Federal Court sitting in Louisiana, give full faith and credit to the Legislative Acts and jurisprudence of the States of Massachusetts and [fol. 19] Illinois.

(c) Deprive the defendant of its property and rights without due process of law.

(d) Deny to defendant equal protection of the law.

8

That Act 55 of the Louisiana Legislative Session of 1930, as amended; Section 14.45 of Act 195 of the Louisiana Legislative Session of 1948; Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 and Acts 541 and 542 of the Louisiana Legislative Session of 1950, under which this proceeding is brought, do not apply under the facts of this case, or, if applicable, violate the provisions of the Federal and Louisiana Constitutions referred to in Article 7 hereof insofar as the said Acts give, or purport to give, complainants herein a direct cause of action against defendant under the facts set forth in this motion, as evidenced by the decision of this Court in the case of *Bish vs. The Employers' Liability Assurance Corporation, Limited*, 102 F. Supp. 343.

9

That, accordingly, the complaint herein fails to state a claim against your defendant upon which relief can be granted.

Wherefore, defendant prays that this Motion to Dismiss and Plea of Unconstitutionality be sustained, and that Act 55 of the Louisiana Legislative Session of 1930 as amended; Section 14.45 of Act 195 of the Louisiana Legislative Session of 1948; Section 655 of Title 22 of the Louisi-

[fol. 20] and Revised Statutes of 1950 and Acts 541 and 542 of the Louisiana Legislative Session of 1950, each be declared unconstitutional, if applicable to this proceeding, in that they violate those sections of the Federal Constitution listed in Article 7 of this motion.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for Defendant, The Employers' Liability Assurance Corporation, Limited, 1500 Commercial National Bank Bldg., Shreveport, Louisiana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED TO DISMISS AND ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT—Filed April 28, 1952

Defendant, The Employers' Liability Assurance Corporation, Limited, moves the Court:

1

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2

Alternatively, for an order directing complainant to file a more definite statement of the following matters:

(a) The ingredients of the "Toni Home Permanent" used by complainant, Mrs. Ruth S. Watson, and the [fol. 21] respects in which said ingredients are detrimental to and dangerous to human beings.

The ground of the alternative motion is that, in regard to the matters pointed out, the complaint is so vague that the defendant cannot reasonably be required to frame a responsive pleading thereto. The complaint is defective in that it constitutes legal conclusions of the pleaders, is

not a clear and concise statement, and complainants should state the facts upon which they base their allegations.

Wherefore, defendant prays that this Motion to Dismiss be sustained and the suit of complainants dismissed at their costs.

Alternatively, defendant prays that Motion for More Definite Statement be sustained and complainants directed to file a more definite statement of the matters above set forth.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King,
Attorneys for Defendant, The Employers' Liability Assurance Corporation, Limited, 1500 Commercial National Bank Bldg., Shreveport, Louisiana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF THE GILLETTE COMPANY AND SHELDON FLYNN TO
DISMISS AND ALTERNATIVE MOTION TO QUASH THE SERVICE
AND CITATION—Filed May 12, 1952

The Gillette Company and Sheldon Flynn move the Court [fol. 22] to dismiss this action for failure to state a claim upon which relief can be granted and in the alternative to quash the service and citation upon Gillette Safety Razor Company on the following grounds:

1

That since March 26, 1952 there has been no corporation named Gillette Safety Razor Company.

2

That the Toni Company, at the time the supplemental and amended complaint was filed herein on April 18, 1952, was and is a division of the Gillette Company.

3

That Sheldon Flynn on April 18, 1952 was not an employee of the Gillette Safety Razor Company but was an employee of the Gillette Company.

4

That the citation issued herein to the Gillette Safety Razor Company and service upon the Gillette Safety Razor Company through Sheldon Flynn were invalid for the reasons hereinabove set forth.

Wherefore appearers pray that this motion to dismiss be sustained and the complainants' suit against the Gillette Safety Razor Company be dismissed. In the alternative appearers pray that the citation issued herein to the Gillette Safety Razor Company and service thereof upon Sheldon Flynn be quashed and set aside and the complainants' suit be dismissed at their cost.

[fol. 23] Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for Gillette Company and Sheldon Flynn, 1500 Commercial National Bank Bldg., Shreveport, Louisiana.

Certificate of Service—(omitted in printing).

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AND AMENDED PETITION—Filed May 13, 1952

Now into this Honorable Court, through undersigned counsel, come B. Clinton Watson and Mrs. Ruth S. Watson, complainants in the above numbered and entitled cause, and file this their second supplemental and amended petition and with respect, show:

1

That since the filing of their original complaint herein on April 5, 1952, they have been informed, and on such in-

formation allege, that the Gillette Safety Razor Company, named defendant herein, has been dissolved and its assets transferred to a corporation styled "The Gillette Company", which is a corporation organized and existing under [fol. 24] and by virtue of the laws of the State of Delaware, or has merged with said corporation;

2

That on such information, complainants show that said Gillette Company succeeded to all of the assets of Gillette Safety Razor Company and assumed all of its obligations and liabilities, including its liabilities to complainants herein;

3

That because of the corporate manipulations of said Gillette Company and said Gillette Safety Razor Company, complainants show that said Gillette Company is in reality an alter ego of Gillette Safety Razor Company with the same liabilities and obligations and said Gillette Company should be made a defendant herein;

4

That said Gillette Company is not authorized to do business in Louisiana but is actually doing business in Louisiana and maintains its Southern Division in the City of New Orleans, Orleans Parish, Louisiana, at 521 International Mart Building, said City;

Wherefore, complainants pray that the Gillette Company be served with a copy of the original petition and first supplemental petition filed herein and with a copy of this supplemental petition through its representatives at New Orleans, Louisiana, and cited to appear and answer hereto within the delay prescribed by law and that after due proceedings shall have been had, there be judgment herein in favor of petitioners and against the Gillette Company and the Gillette Safety Razor Company, as the Court may determine is the proper corporate entity, in solido, in favor [fol. 25] of B. Clinton Watson in the full sum of \$25,827.42 and in favor of Mrs. Ruth S. Watson in the full sum of \$50,000.00, with five percent per annum interest on all of said sums from date of judicial demand until paid;

Complainants further pray for all necessary orders and decrees and for full, general and equitable relief and for trial by jury.

(Sgd.) Luther S. Montgomery, Lunn, Irion, Switzer, Trichel & Johnson, by Richard H. Switzer, Attorneys for Complainants, 1305 Slattery Building, Shreveport, Louisiana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF THE GILLETTE COMPANY TO QUASH SERVICE OF SUMMONS AND ATTACKING JURISDICTION OF THE COURT—
Filed June 13, 1952

The Gillette Company, appearing herein solely and only for the purpose of making this motion to question the jurisdiction of the court over its person and for said purpose only, moves the court to sei aside and quash the supposed service of summons upon the defendant herein, and as grounds therefor, shows to the court the following:

1. This court lacks jurisdiction over the person of the defendant.

2. Service of the alleged process herein is insufficient.

[fol. 26] 3. The venue herein is improper and contrary to law.

4. That the defendant, The Gillette Company (formerly Gillette Safety Razor Company, a change of name to The Gillette Company having been made effective on the 26th day of March, 1952), a corporation, before and at the time of the commencement of this suit, was and ever since has been, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business at 15 W. First Street, Boston 6, Massachusetts; that said defendant is not and never was a corporation organized or existing under the laws of the State of Louisiana, or a resident of Louisiana, and is not and never has been licensed or qualified under the laws of the State of Louisiana to do business in the State

of Louisiana; that said defendant never has appointed or authorized any agent to accept service of process for it in any suit in the State of Louisiana; and that the said defendant at the time of the supposed service of summons herein was not found within the State of Louisiana.

5. That the defendant did not at the time of the alleged service of summons or at any time have any officer or local or general agent of any kind in the State of Louisiana, who did or could manage the business of this defendant or accept service of process on behalf of this defendant in Louisiana.

6. The purported service of summons herein and writ thereof by the United States Marshall is illegal and void in that Sheldon Flynn or any employee in the office at 521 International Mart Building, New Orleans, Louisiana, never had any authority to accept service of summons on behalf [fol. 27] of this defendant; that said Sheldon Flynn and the employees in the office at 521 International Mart Building, New Orleans, had authority only to solicit business and orders for the goods of this defendant, and to submit such orders to the defendant for its acceptance or rejection at its offices at 15 W. First Street, Boston 6, Massachusetts, where such orders were and are either accepted or rejected by said defendant; That no stock of goods or merchandise belonging to the defendant for the purpose of sale or for shipment to customers of the defendant has been maintained in Louisiana; that all goods and merchandise sold by defendant to its customers residing within the State of Louisiana or elsewhere, upon orders so accepted at Boston, Massachusetts, were and are shipped directly by defendant to such customers from defendant's factory in Boston, Massachusetts; and that title to all said products shipped to purchasers in Louisiana passes to purchasers on delivery to the carrier at Boston, Massachusetts.

7 That the alleged service of summons herein is illegal and void because it deprives defendant of due process of law contrary to the Constitution and the laws of the State of Louisiana and the Constitution of the United States and because it deprives the defendant of equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States and because it places an illegal and unreasonable burden on the Interstate commerce carried on by the defendant as aforesaid, said illegal and unrea-

sonable burden being contrary to the Commerce Clause of Section 8 of Article I of said Constitution, and because otherwise contrary to its rights under the said Constitution and to its rights under the Constitution and laws of the State of Louisiana.

[fol. 28] 8. That the defendant has not accepted or waived and does not accept or waive service of summons herein.

Wherefore defendant prays that this motion be set for taking evidence in support hereof and, after hearing duly had, that this motion to dismiss for lack of jurisdiction be sustained and the complainants' suit be dismissed. In the alternative, defendant prays that the citation issued herein to *to* it through Sheldon Flynn and service thereof upon the employee in the New Orleans office, aforesaid, be quashed and set aside and the complainants' suit dismissed at their costs.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King,
Attorneys for The Gillette Company, 1500 Com-
mercial Bank Bldg., Shreveport, Louisiana.

Certificate of Service—(omitted in printing).

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OBJECTION OF THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED TO ALLOWANCE OF SECOND SUPPLEMENTAL AND AMENDED COMPLAINT AND ALTERNATIVE MOTION TO DROP THE GILLETTE COMPANY AS PARTY DEFENDANT—Filed [fol. 29] June 25, 1952

Defendant, The Employers' Liability Assurance Corporation, Limited with respect shows:

1

That this action was filed by complainants on April 3, 1952 against The Employers' Liability Assurance Corporation, Limited, as insurer on a policy of public liability in-

insurance of The Toni Company, a division of the Gillette Safety Razor Company, pursuant to the provisions of Section 655 of Title 22 of the Louisiana Revised Statutes of 1950, as amended.

2

That the complainants, having elected to proceed in a direct action against the insurance company alone, have no right to join the Gillette Company as a defendant in this action, and your appearer objects to the allowance of the second supplemental and amended complaint.

3

In the alternative your defendant shows that The Gillette Company should be dropped as a party defendant.

Wherefore your defendant, The Employers' Liability Assurance Corporation, Limited, prays that its objection to the allowance of the second supplemental and amended complaint, seeking to join the Gillette Company as a defendant, be sustained.

In the alternative it prays that the Gillette Company be dropped as a party defendant.

[fol. 30] Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for Defendant, The Employers' Liability Assurance Corporation, Limited, 1500 Commercial National Bank Building, Shreveport, Louisiana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTES OF THE COURT—July 11, 1952

By agreement all pending motions were ordered submitted on briefs; defendant's brief to be filed within 30 days and plaintiff's brief 10 days thereafter.

Ordered that the Court be adjourned.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MILTON C. TRICHEL, JR.—Filed July 11, 1952

STATE OF LOUISIANA,
Parish of Caddo:

Before me, the undersigned authority, personally came and appeared Milton C. Trichel, Jr., who, being by me first [fol. 31] sworn, deposes and says:

That he is a practicing attorney of the Shreveport, Louisiana Bar and is a resident and citizen of Shreveport, Caddo Parish, Louisiana;

That during the first week of April, 1952 he visited the City of New Orleans, Louisiana and while there visited the establishment of the Gillette Safety Razor Company in the International Trade Mart Building at 124 Camp Street, said City;

That he found that said Gillette Safety Razor Company maintains a District Sales Office at 521 International Trade Mart Building and that said Gillette Safety Razor Company has its name printed or painted upon the door of said building leading to said offices; that numerous products of said company were displayed in said office; that he saw therein at least two employees of said company, one male and one female; that the New Orleans telephone directory carries a listing in the name of Gillette Safety Razor Company and gives the telephone number as Raymond 1740; that he was advised by the personnel in said office that said Gillette Safety Razor Company made sales and transacted all kinds of business of said company through said office, both in the State of Louisiana and elsewhere; that he was advised by said personnel that said office was the Southern Division Sales Office of the Gillette Safety Razor Company;

Further deponent sayeth not.

(Sgd.) Milton C. Trichel, Jr.

Sworn to and Subscribed before me, Notary, on this the 7th day of July, 1952. (Sgd.) Harry A. Johnson, Jr., Notary Public.

[fol. 32] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RICHARD H. SWITZER

STATE OF LOUISIANA,

Parish of Caddo:

Before me, the undersigned authority, personally came and appeared Richard H. Switzer, who, being by me first duly sworn, deposes and says:

That he is a practicing attorney of the Shreveport Louisiana Bar and is a citizen and resident of the City of Shreveport, Caddo Parish, Louisiana;

That on June 2nd, 1952 he visited the City of New Orleans, Louisiana; that while in said City he visited the International Trade Mart Building at 124 Camp Street, said City, where he found that the Gillette Safety Razor Company maintained an establishment and offices at suite 521 in said building; that he saw at said suite complete displays of said company's merchandise, including hair wave sets; that its name is painted on the entrance of said suite and posted on a bulletin board in the lobby of said building; that there were two employees of said company at work and on duty in said offices at said time and one customer; that he saw a telephone therein and upon inspection of the New Orleans telephone directory found a listing therein in the name of Gillette Safety Razor Company, giving the telephone number as Raymond 1740;

[fol. 33] That he has checked in several cities in the State of Louisiana and finds that Gillette Safety Razor Company's products are sold at retail in all of said cities in Drug Stores, Five & Ten Cent Stores, Novelty Stores including razors, razor blades, shaving cream and Toni Home Sets;

That he interviewed the Assistant Manager of said International Trade Mart Building, after first ascertaining that the manager was absent from the city; that he inspected a standard form of lease required of all tenants of said International Trade Mart Building, including said Gillette Safety Razor Company, said lease being identical to the lease signed by said Gillette, and that said lease required said tenant to transact at least a wholesale business from

said premises; that he also obtained from said Assistant Manager a pamphlet setting forth the purposes and aims of said International Trade Mart, which pamphlet is hereto attached, with particular reference being made to that portion encircled in red on page 3 thereof; that he further ascertained from said Assistant Manager that said Gillette was complying with all of the terms and provisions of its lease and particularly that rule of said Mart encircled in red hereinabove referred to;

That while in New Orleans he learned that one Sheldon Flynn styles himself as District Manager of said Gillette Safety Razor Company and that said office styles itself as "District Sales Office"; That the United States Marshal for the Eastern District of Louisiana wrote him a letter stating that the said Sheldon Flynn made extended sales tours for said Gillette Safety Razor Company, as shown by a photostatic copy of letter hereto attached; that affiant attaches hereto photostatic copy of letter received through the United States mail from said office in New Orleans, signed by Sheldon Flynn, District Sales Manager, ad-[fol. 34] dressed to one R. W. Smalling at Shreveport, Louisiana, in reply to a letter affiant is informed was written to said office in New Orleans, Louisiana;

Further deponent sayeth not.

(Sgd.) Richard H. Switzer.

Sworn to and subscribed before me, Notary, on this the 7th day of July, 1952. (Sgd.) Harry A. Johnson, Jr., Notary Public.

GILLETTE SAFETY RAZOR COMPANY

District Sales Office
521 International Trade Mart
124 Camp Street
New Orleans 12 La.
Phone RAYmond 1740

April 8, 1952.

Mr. R. W. Smalling
Radio Station KRMD
Shreveport, Louisiana

DEAR SIR:

This will acknowledge your letter of April 5 relative to your broken Gillette razor.

If you will send the razor to us, we will be pleased to replace same for you. Or, you may return your razor directly to the factory (15 West First Street, Boston 6, Mass.) and a replacement will also be made.

Thanking you for your interest in our products, and calling our attention to the imperfect razor.

Very truly yours, Gillette Safety Razor Company,
(Sgd.) Sheldon Flynn, District Manager.

SF:mkh.

[fol. 35]

DEPARTMENT OF JUSTICE
 United States Marshal
 Eastern District of Louisiana
 New Orleans, Louisiana

May 20, 1953.

Messrs. Irion & Switzer
 Attorneys at law
 1305 Slattery Bldg.
 Shreveport, Louisiana

Re: C. A. No. 3697, MRS. MARIE BISH, et vir,
 Re: C. A. No. 3700, B. C. WATSON, et ux,

vs.

GILLETTE SAFETY RAZOR CO., et al.

GENTLEMEN:

We have made two attempts to serve the Gillette Safety Razor Company, through Mr. Sheldon Flynn in the International Mart Bldg., here in New Orleans. We have been advised that Mr. Flynn is on an extended sales tour and that he will possibly not return to New Orleans for about a month.

I will appreciate it if you will advise me whether you want me to retain the services we have in the above matter and attempt to serve Mr. Flynn when he returns.

Yours very truly,

Louis F. Knop, Jr., U. S. Marshal. (Sgd.) P. A.
 Gandy, per G., Chief Deputy.

ITEM IN PAMPHLET PUBLISHED BY INTERNATIONAL TRADE
 MART

The Trade Mart is not merely a place where goods are exhibited but also a place where goods actually are bought and sold—where all arrangements of sale are completed [fol. 36] and deliveries arranged. Each tenant is required to maintain sales personnel as well as to display his merchandise.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 52 C 443

MARIE BISH and JAMES N. BISH, Plaintiffs,

vs.

GILLETTE SAFETY RAZOR COMPANY, a corporation, Defendant

AFFIDAVIT OF BOONE GROSS—Filed July 11, 1952

COMMONWEALTH OF MASSACHUSETTS,

County of Suffolk, ss:

Boone Gross, being first duly sworn on oath, deposes and says that he is a resident of Waban, County of Middlesex, Commonwealth of Massachusetts; that since the first day of January 1946, affiant has been employed by the defendant in the above entitled cause, The Gillette Company (formerly Gillette Safety Razor Company, a change of name to The Gillette Company having been made effective on the 26th day of March, 1952), a corporation, organized and existing under the laws of the State of Delaware, having executive offices and the principal place of business and manufacturing plant of its Gillette Safety Razor Company Division at 15 West First Street, Boston 6, Massachusetts, which [fol. 37] Division is engaged in the manufacture and sale of razors, razor blades, and shaving cream; that affiant was the sales manager of defendant from January 1, 1946 to March 26, 1952; that on March 25, 1947 affiant was elected Vice-President of defendant and, since that date, affiant has held and still holds the said office of Vice-President of defendant; that on March 26, 1952, affiant was elected President of defendant's Division, Gillette Safety Razor Company, and since that date affiant has held and still holds the said office of President of defendant's said Division;

That the defendant maintains, and has maintained, an office at 124 Camp Street, New Orleans, Louisiana, only for convenience in the solicitation of orders for said Division's products by its sales representatives, which said sales representatives were never authorized, and never had and do not now have any powers or authority, to represent or

act as agent of the defendant in any other capacity than the solicitation of sales, or for any other purpose than is herein set forth, and have never had, and have not now, any power or authority to enter into any contract or make any sales or other contracts on behalf of the defendant, but are appointed by said defendant merely to solicit orders in New Orleans and adjoining trade territory for said Division's products, and to submit such orders to the defendant for its acceptance or rejection at its offices at 15 West First Street, Boston 6, Massachusetts, where such orders were and are either accepted or rejected by said defendant;

That no stock of goods or merchandise belonging to the defendant for the purpose of sale or for shipment to customers of the defendant or for any other purpose has been [fol. 38] maintained in Louisiana; that all goods and merchandise sold by defendant to its customers residing within the State of Louisiana or elsewhere, upon orders so accepted at Boston, Massachusetts, were and are shipped directly by defendant to such customers from defendant's factory in Boston, Massachusetts; that title to all said products shipped to purchasers in Louisiana passes to purchasers on delivery to the carrier at Boston, Massachusetts; that attached hereto, marked exhibit "A" and made a part hereof, is a true and correct copy of the sales order form used by sales representatives of said Division in Louisiana and elsewhere, and attached hereto, marked exhibit "B" and made a part hereof, is a true and correct copy of the invoice used by said Division in invoicing customers in the State of Louisiana and elsewhere; that the said sales order and invoice do not contain the address of the office maintained at 124 Camp Street, New Orleans, Louisiana;

That the lease for the office at 124 Camp Street, New Orleans, Louisiana referred to in the affidavit of Milton C. Trichel, Jr. (filed herein on behalf of the plaintiff), was executed on behalf of the defendant at its offices at Boston, Massachusetts and that no lease for said premises was executed by the defendant at any time in the State of Louisiana; that the defendant has not and does not now maintain any bank account in the State of Louisiana; that all salaries and bonuses paid to said Division's sales representatives

in Louisiana have been paid at all times directly from defendant's offices at Boston, Massachusetts;

That defendant is not and never was a corporation organized or existing under the laws of the State of Louisiana or a resident of Louisiana, and is not and never has been [fol. 39] licensed or qualified under the laws of the State of Louisiana to do business in Louisiana; that defendant never has appointed or authorized any agent to accept service of process for it in any suit in the State of Louisiana.

Further, affiant saith not.

(Sgd.) Boone Gross.

Subscribed and sworn to this 22nd day of May, A. D. 1952, before me, a notary public, who hereby certify under my official seal that I am duly authorized by the laws of the Commonwealth of Massachusetts to administer oaths in the county and state aforesaid. (Sgd.) Malcolm C. Stevens, Notary Public. My Commission Expires January 2, 1953.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 52 c 443

MARJE BISH and JAMES N. BISH, Plaintiffs,

vs.

GILLETTE SAFETY RAZOR, a Corporation, Defendant

AFFIDAVIT OF SHELDON FLYNN—Filed July 11, 1952

[fol. 40] STATE OF TENNESSEE,

County of Shelby, ss:

Sheldon Flynn, being first duly sworn, on oath deposes and says that he resides at 1459 Owens Boulevard, New Orleans, Parish of Orleans, State of Louisiana; that since the 22nd day of December, 1941, except for the period from May 22, 1943, to April 26, 1946, during which time

he served in the armed forces of the United States, affiant has been employed in various capacities by the defendant in the above entitled cause, The Gillette Company (formerly Gillette Safety Razor Company, a change of name to The Gillette Company having been made effective on the 26th day of March 1952), a corporation, organized and existing under the laws of the State of Delaware, having executive offices and the principal place of business and manufacturing plant of its Gillette Safety Razor Company Division at 15 West First Street, Boston 6, Massachusetts, which Division is engaged in the manufacture and sale of razors, razor blades and shaving cream; that affiant now is the District Sales Manager for the sole and only purpose of soliciting orders in the New Orleans district and adjoining trade territory for said Division's products; that affiant has never had and does not now have any power or authority to accept such orders or to enter into any contract or to make any sales on behalf of said defendant, but was and is appointed as aforesaid by said defendant merely to solicit orders in New Orleans and adjoining trade territory for said Division's products and to submit such orders to the defendant for its acceptance or rejection at its offices at 15 West First Street, Boston 6, Massachusetts, where such [fol. 41] orders were and are either accepted or rejected by said defendant; title to all said products shipped to purchasers in Louisiana passes to purchasers on delivery to the carrier at Boston, Massachusetts; that affiant was and is employed by said defendant on a salary and bonus basis; that salary and bonuses are paid to the affiant at all times directly from defendant's offices at Boston 6, Massachusetts; that affiant was never appointed or authorized by defendant to, and never had, and does not now have, any power or authority to represent or act as agent of said defendant in any other capacity or for any other purpose than as hereinbefore set forth and has not entered into any contract or made any sales on behalf of said defendant; that the defendant is not and never was a corporation organized or existing under the laws of the State of Louisiana or a resident of Louisiana, and is not and never has been licensed or qualified under the laws of the State of Louisiana to do business in Louisiana; that said

defendant never has appointed or authorized any agent to accept service of process for it in any suit in the State of Louisiana; that defendant has an office at 124 Camp Street, New Orleans, Louisiana, for the convenience of the solicitation only of orders by the affiant and one other sales representative, who is employed and bound in the solicitation of orders in the same manner as the affiant aforesaid; that no stock of goods or merchandise belonging to the defendant for the purpose of sale or for shipment to customers of defendant or for any other purpose has been maintained in Louisiana; that all goods and merchandise sold by said defendant to its customers residing within the State of Louisiana or elsewhere, upon orders so accepted by the defendant at Boston, Massachusetts, were and are shipped directly by defendant to such customers from defendant's [fol. 42] factory in Boston, Massachusetts; that affiant is not, and has never been, an officer or director of the defendant; that affiant was never appointed or given any power or authority by defendant, that he never had and has not now any power or authority whatever, to accept service of summons on behalf of said defendant in this or any other suit against said defendant.

Further, affiant saith not.

(Sgd.) Sheldon Flynn.

Subscribed and sworn to this 22nd day of May, A. D. 1952, before me, a notary public, who hereby certify under my official seal that I am duly authorized by the laws of the State of Tennessee to administer oaths in the county and state aforesaid. (Sgd.) Florence M. Wehrheim, Notary Public. My com. exp. 7-7-53. (Seal.)

Certified Copy. D. C. Form No. 30

UNITED STATES OF AMERICA,

Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full

copy of the original Affidavit of Boone Gross and Affidavit of Sheldon Flynn filed May 26, 1952, in the case of:

[fol. 43]

No. 52 C 443

MARIE BISH and JAMES N. BISH

vs.

GILLETTE SAFETY RAZOR COMPANY, a Corporation

now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 2nd day of July, A.D. 1952.

(Sgd.) Roy H. Johnson, Clerk, by (Sgd.) Eleanor B. Davis, Deputy Clerk.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF LOUISIANA, SHREVEPORT DIVISION

Civil Action

No. 3700

B. CLINTON WATSON, et ux.

v.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.

OPINION OF THE COURT ON MOTION TO DISMISS—September 12,
1952

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[fol. 44] DAWKINS, J.:

This suit was filed originally in the State Court for Bien-ville Parish against the insurer, Employers Liability Assurance Corporation, Ltd. (called Employers), alone, of the Gillette Safety Razor Company, (called the Razor Com-

pany), and was moved here by the defendant on the ground of diverse citizenship. The removed record was filed on April 16, 1952, and on the 18th of the same month, plaintiff filed an amended complaint adding the said insured as a party defendant. On April 28, Employers moved to dismiss the suit against the insurer on a plea of unconstitutionality of the direct action statute, No. 541 of the Louisiana Legislature of 1950. On the same day, it filed objections to the allowance of the amended complaint making the Razor Company a party defendant, and, in the alternative, "to drop it" from the case.

Thereafter, motions of the same general character, pleading insufficiency or improper service, etc., as in the Bish case, No. 3697 on the docket of this court, were filed by defendant. Plaintiffs then filed a second amended complaint making the Gillette Company a party defendant. They prayed that this second amendment, with the original and [fol. 45] first amended complaint, be served upon both the Gillette Company and the Razor Company, and for judgment against them "as the Court may determine is the proper corporate entity". In a certificate at the foot of the second amended complaint, counsel for plaintiffs certified that "a copy of the above and foregoing supplemental and amended complaint has been served upon defendant, Gillette Safety Razor Company" and upon Employers "by mailing same to its attorneys of record * * * and that service is being made upon defendant, The Gillette Company, through the proper United States Marshal".

On June 25, counsel for defendant filed on behalf of Employers a similar motion objecting to the allowance of the second amended complaint, and, in the alternative, "to drop" the Gillette Company as defendant.

On April 11, 1952, by agreement of counsel, all pending motions submitted were taken under advisement on briefs.

The issues involved in the motion to dismiss insurer (Employers) on the ground of the unconstitutionality of Act 541 of 1950 are the same as in *Bish v. Employers Liability Assurance Corp., Ltd.*, 102 F. Supp. 343, which was sustained. Nothing in the arguments has caused this Court to change its views, but they have been, in effect, sustained in *Fisher v. Home Indemnity Company* by the Court of Appeals for this Circuit in its decision handed down on

June 30th last. The only difference is that the suit was filed here after the change made in the State law by the Acts 541 and 542 of 1950, applying to all policies of insurance whether made or delivered in the State or elsewhere. The latter act compels an insurer, as a condition to doing business in this State, to consent in writing to be sued in a direct action alone [fol. 46] upon any policy wherever written, in complete disregard of any "no action" clause. These matters were dealt with fully by this court in the case of *Mayo v. Zurich General Accident & Liability Ins. Co.*, No. 3638 on the docket of this court, decided August 15, 1952. Both statutes were held to be unconstitutional insofar as they dealt with policies written and delivered outside the State of Louisiana, and that the State could not impose the compulsory consent either before or after the insurance company did business here. See also *Bayard v. Traders & Gen. Ins. Co.*, 99 F. Supp. 343, and *Bish v. Employers Liability Assurance Corp., Ltd.*, 102 F. Supp. 343.

Employers will therefore be dismissed from the case for the reasons stated in those decisions.

This leaves the question of whether the plaintiff can retain or continue the action against the Razor Company or the Gillette Company, which were not joined in the original suit in the State Court.

The decisions holding Act 55 of 1930 and Act 541 of the Louisiana Legislature of 1950 (now Sec. 655 of Title 22 of the Revised Statutes of Louisiana) unconstitutional as to contracts made outside the State and valid where made, have had the effect of saying there is no right or cause of action originally against the insurer alone when it was filed in the State Court. It cannot be seen, therefore, that the adding of the insured as another party defendant after removal to this court could breathe life into the case as is now undertaken. Had the plaintiff joined one or both of the Gillette Companies in the suit in the State Court with the insured, it would have been as invalid as it was against the [fol. 47] latter alone. When removed in that condition, it would have been subject to dismissal here since it was just as much a violation of the constitutional rights of the insurer in that form as against it alone. All the more reason why the same purpose cannot be accomplished by adding the insurer here and attempting at the same time to keep the

insured in the case. It would be just as prejudicial to the insurer to have to defend before a jury, jointly with the insured, the issue of responsibility for the accident and the amount to be recovered, if condemned, as if the insured were sued alone. The whole matter, it would seem, turns upon the question of the right of the insurer, under its contract, **to have those questions first determined against the insured alone, before being hauled into court for any purpose.**

The conclusion thus reached requires a dismissal of the entire case as to all defendants, and it is unnecessary to go into the controversies over service of process, etc.

Done and Signed in Chambers, at Monroe, Louisiana, this 12th day of September, 1952.

(Sgd.) Ben C. Dawkins, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTES OF THE COURT—September 24, 1952

[fol. 48] This case came on for signing and filing of Judgment. A proposed judgment was presented by counsel for each side. Argument was had, and the Court signed and filed the Judgment presented by the defendant.

It was ordered that the Court be adjourned.

IN UNITED STATES DISTRICT COURT

No. 3700

JUDGMENT—September 29, 1952

This cause came on to be heard on the plea of unconstitutionality and motions of the defendant, The Employers' Liability Assurance Corporation, Limited, to dismiss for failure to state a claim upon which relief can be granted and objecting to the allowance of supplemental complaints joining Gillette Safety Razor Company the Gillette Company as parties-defendants, and on motions of the defendants, Gillette Safety Razor Company and the Gillette Company, to dismiss for failure to state a claim upon which relief can be granted, evidence having been adduced, the matter

briefed, argued and submitted and the Court having sustained the plea of unconstitutionality in part and granted the said motions for reasons assigned in the written opinion filed herein:

It is hereby ordered, adjudged and decreed that Acts 541 and 542 of the Louisiana Legislative Session of 1950, inso-[fol. 49] far as they apply to an insurance company issuing and delivering a policy of public liability insurance outside the State of Louisiana, be and the same are hereby declared to be unconstitutional, null and void.

It is further ordered, adjudged and decreed that this action in all its aspects, be dismissed as to all defendants and that defendants recover their cost.

Judgment rendered, read aloud and signed in Open Court at Shreveport, Louisiana, on this 29 day of September, 1952.

Ben C. Dawkins, Judge, U. S. District Court.

Filed Sept. 24, 1952. Alto: L. Curtis, Clerk.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 25, 1952

Notice is hereby given that B. Clinton Watson and Mrs. Ruth S. Watson, complainants in the above numbered and entitled cause, hereby appeal to the Court of Appeals of the United States for the Fifth Circuit from the judgment rendered herein in favor of defendants, Employers Liability Assurance Corporation, Ltd., Gillette Safety Razor Company and the Gillette Company, on September 24, 1952.

Shreveport, Louisiana, this 25 day of September, 1952.

(Sgd.) Luther S. Montgomery, Cleve Burton,
[fols. 50-52] Richard H. Switzer, 1305 Slattery
Building, Shreveport, Louisiana, Attorneys for
Complainants.

CERTIFICATE OF SERVICE—(Omitted in Printing)

[File endorsement omitted.]

Bond on appeal for \$250.00, filed September 25, 1952—
omitted in printing.

[fol. 53] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed
September 25, 1952

B. Clinton Watson and Mrs. Ruth S. Watson having appealed to the United States Court of Appeals, Fifth Circuit, from the judgment dismissing their suit against the defendants herein signed September 24th, 1952, hereby designate the following to constitute the record on appeal:

1. Original complaint;
 2. Petition for removal;
 3. First Supplemental and amended complaint;
 4. Objection to allowance of supplemental and amended complaint and alternative motion to drop Gillette Safety Razor Company as defendant, filed by Employers Liability Assurance Corporation, Ltd.;
 5. Motion to dismiss and plea of unconstitutionality filed by Employers Liability Assurance Corporation, Ltd.;
 6. Motion to dismiss and alternative motion for a more definite statement filed by Employers Liability Assurance Corporation, Ltd.;
- [fol. 54] 7. Motion to dismiss and alternative motion to quash service and citation filed by Gillette Company and Sheldon Flynn;
- 7A. All affidavits filed in connection with motions filed herein, originally filed in Civil Action 3697.
8. Second supplemental and amended complaint;
 9. Motion to quash service of summons and attacking jurisdiction of the Court filed by the Gillette Company;
 10. Objection to allowance of second supplemental and amended complaint and motion to drop the Gillette Company as defendant filed by Employers Liability Assurance Corporation, Ltd.;
 11. Opinion of Court dismissing complainant's suit as against all defendants dated September 12, 1952;
 12. Judgment of Court dated September 24, 1952;
 13. Minutes of Court;
 14. Notice of appeal;
 15. Bond for costs on appeal;

16. Designation of contents of record;

17. Clerk's certificate.

[fol. 55] (Sgd.) Luther S. Montgomery, Cleve Burton, Richard H. Switzer, 1305 Slattery Building, Shreveport, Louisiana, Attorneys for Complainants.

CERTIFICATE OF SERVICE—(Omitted in Printing)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

**DESIGNATION BY APPELLEES OF ADDITIONAL PORTION OF
RECORD ON APPEAL—Filed September 26, 1952**

Employers Liability Assurance Corporation, Limited, Gillette Safety Razor Company and The Gillette Company, appellees, designate the following matters to be included in the record on appeal in addition to the matters designated by the appellants:

[fol. 56] 1. The entire remaining record in the above numbered and entitled cause including all exhibits, all stipulations of counsel and all minutes of the Court.

2. This designation.

(Sgd.) Benjamin C. King, Charles D. Egan, Attorneys for Appellees, 1500 Commercial National Bank Building, Shreveport, Louisiana.

[File endorsement omitted.]

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] **ARGUMENT AND SUBMISSION—January 20, 1953—
(Omitted in Printing)**

[fol. 59] IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 14316

B. CLINTON WATSON, et ux., Appellants,

versus

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED,
et al., Appellees

Appeal from the United States District Court for the
Western District of Louisiana

Before Hutcheson, Chief Judge, and Strum and Rives,
Circuit Judges

OPINION—February 27, 1953

HUTCHESON, Chief Judge:

This is the latest to be decided in a series of five tort actions ¹ brought in the Western District of Louisiana against [fol. 60] insurers under the Louisiana Direct Action Statutes.²

Originally filed in the state court against appellee, the liability insurer of Gillette Safety Razor Company, under a policy ³ containing a "no action" clause valid in Massachusetts, where the policy was written, and in Illinois, where it was delivered, the suit was for damages sustained by plaintiff as a result of using "A New Toni Home Permanent" alleged to be a product manufactured and sold by a department of Gillette Safety Razor Co., the insured.

¹ Bayard v. Traders & General, 99 Fed. Supp. 343, decided 8-18-51; Bish v. Employers, 102 Fed. Supp. 343, decided 1-28-52; Mobley v. K. C. Southern, et al., (unreported) decided 3-22-52; Mayo v. Zurich, 106 Fed. Supp. 580, decided 8-16-52; Watson v. Employers, 107 Fed. Supp. 494, decided 9-15-52.

² Acts 541 and 542 of 1950 of the State of Louisiana.

³ Identical as to insurers and insured and otherwise, except as to dates, with, indeed a renewal of the policy in the Bish case, reported below, 102 Fed. Supp. 344.

The claim was that plaintiff, Mrs. Watson, though she had used the product precisely as directed, had been seriously and permanently injured as a result of so using it, and that defendant, Employers Liability Assurance Corporation, having issued a policy of liability insurance insuring and protecting its insured from liability for negligence, was liable to her for the damages she sued for.

The cause removed by the defendant into the federal court, there followed a welter of pleadings and affidavits, more fully described in the opinion of the district judge.⁴ By and in these, plaintiff undertook, by supplemental and amended complaints filed without leave obtained, to make an additional party, first, Gillette Safety Razor Co., and next, the Gillette Company.

[fol. 61] The defendant Employers opposed the filing of these pleadings and the making of these parties; and each of the Gillette companies, on jurisdictional grounds, resisted being brought into the suit.

In addition, Employers filed an extended motion to dismiss the action against it.⁵

⁴ *Watson v. Employers Liability Assurance Co.*, 107 Fed. Supp. 494.

⁵ Its grounds were: that under the terms of its policy it was not subject to a direct action; that to subject it to such action was to deny full faith and credit to the laws of Massachusetts and Illinois, where the policy was issued and delivered; that it would violate Secs. 1 & 10 of Art. 4 and Sec. 1, of the 14th Amendment to the Constitution of the United States, and Sec. 15 of Art. four of the Constitution of La. in that such action would, (a) impair the obligation of the defendant's contract with the Toni Company, (b) deny to defendant its right to have the Courts of Louisiana and the Federal Court sitting in Louisiana give full faith and credit to the Legislative Acts and jurisprudence of the States of Massachusetts and Illinois, (c) deprive the defendant of its property and rights without due process of law, and (d) deny to defendant equal protection of the law; that Act 55 of the Louisiana Legislative Session of 1930, as amended, Sec. 14.45 of Act 195 of the Louisiana Legislative Session of 1948, Sec. 655 of Title 22 of the Louisiana Revised Statutes of 1950, and Acts 541 and 542 of the Louisiana Legislative

On April 11, 1952, all pending motions submitted were taken under advisement on briefs, and on September 29th, for the reasons given in his opinion, the district judge entered judgment granting the motions.

Adjudging and decreeing that Acts 541 and 542 of the Louisiana Legislative Session of 1950 were unconstitutional, [fol. 62] null and void insofar as they attempted to invalidate or otherwise affect the "no action" clause of the policy executed and delivered by a foreign corporation in another state and valid where made, and that the action should in all respects be dismissed, the district judge entered an order dismissing it as to all the defendants.

Appealing from that judgment, the plaintiffs are here seeking its reversal. In support of their contention that the judgment may not stand, they press upon us, first, that the decision dismissing the cause as to Employers was erroneous because it is conceded, as it was in the *Bish* case, that Employers had filed a consent to be sued in a direct action required by Act 42 of 1950, as the condition of doing business in the state.

They press upon us, second, that if the dismissal was not Session of 1950, under which this proceeding is brought, do not apply under the facts of this case, or if applicable, violate the provisions of the Federal and Louisiana Constitutions referred to in Art. 7 hereof insofar as the said Acts give, or purport to give complainants herein a direct cause of action against defendant under the facts set forth in this motion, as evidenced by the decision of this court in the case of *Bish v. The Employers Liability Assurance Corp., Ltd.*, 102 Fed. Supp. 343; and that the complaint herein fails to state a claim upon which relief can be granted.

This was followed by a prayer: that the motion to dismiss and plea of unconstitutionality be sustained; and that Art. 55 of the Louisiana Legislative Session of 1930 as amended, Sec. 14.45 of Act 195 of the Louisiana Legislative Session of 1948, Sec. 655 of Title 22 of the Louisiana Revised Statutes of 1950, and Acts 541 and 542 of the Louisiana Legislative Session of 1950, each be declared unconstitutional, if applicable to this proceeding, in that they violate those sections of the Federal Constitution listed in Art. 7 of this motion.

erroneous as to Employers, it was as to the Gillette corporations because they had the right to substitute or bring the Gillettes in as new and additional parties, and that, upon the affidavits of record, they made out a showing as to the Gillette Company that it was doing business in the state and subject to be sued there.

We do not think so. As to the dismissal of the insurer, it is true that, as the extorted price of doing business in the state, it did file the written consent required by Art. 542 of 1950. We find ourselves, however, in complete accord with the views of the district judge that if the statute is construed as extending to and invalidating the "no action" provision of a policy written and delivered, as this one was, outside of the state, the statute represents an attempt to give [fol. 63] extra territorial effect to Louisiana laws and to subject to them the doing of business, and the business done, in other states. So construed, we are in no doubt that, as contended by Employers and as found by the district judge, it violates the defendant's constitutional rights.

This being so, it is clear that the decisions which settle it that consent to the deprivation of constitutional rights given as the extorted price of doing business in a state cannot prevent the assertion of those rights when they are challenged or sought to be denied, apply in full vigor here.

In complete accord with the reasons summed up by the district judge in his opinion ^a and with the more extended

^a These, as stated by him are:

"The issues involved in the motion to dismiss insurer (Employers) on the ground of the unconstitutionality of Act 541 of 1950 are the same as in *Bish v. Employers' Liability Assurance Corp., Ltd.*, D. C., 102 F. Supp. 343, which was sustained. Nothing in the arguments has caused this court to change its views, but they have been, in effect, sustained in *Fisher v. Home Indemnity Co.*, 5 Cir., 198 F. (2) 218, by the Court of Appeals for this Circuit in its decision handed down on June 30th last. The only difference is that the suit was filed here after the change made in the State law by the Acts 541 and 542 of 1950, LSA-R.S. 22:655, and note, 22:983, subd. E, applying to all policies of insurance whether

treatment accorded these reasons in the *Bish* and *Mayo* cases, *supra*, we shall not further extend this opinion by elaborating upon them. We shall, therefore, content our- [fol. 64] selves with referring with approval to those opinions and the authorities they cite, adding to them others as set out in the appended note.⁷

As to the question whether plaintiffs could or should be allowed to bring into the action, and continue it after dismissal of the insurer as against, either the razor company or the Gillette Company, the district judge was of the opinion, and in effect held, that the dismissal of Employers had effected a dismissal of the whole suit and that it could not be continued on the docket to bring in after removal an additional defendant or defendants not made parties in the state court.

He, therefore, dismissed the action completely and as to all defendants without at all determining or even considering the other questions arising as to the service of process and whether the defendants sought to be substituted are, as made or delivered in the State or elsewhere. The latter act compels an insurer, as a condition to doing business in this State, to consent in writing to be sued in a direct action alone upon any policy wherever written, in complete disregard of any "no action" clause. These matters were dealt with fully by this court in the case of *Mayo v. Zurich General Accident & Liability Ins. Co.*, D. C., 106 Fed. Supp. 579. Both statutes were held to be unconstitutional insofar as they dealt with policies written and delivered outside the State of Louisiana, and that the State could not impose the compulsory consent either before or after the insurance company did business here. See also *Bayard v. Traders & Gen. Ins. Co.*, D. C. 99 F. Supp. 343, and *Bish v. Employers' Liability Assurance Corp., Ltd.*, D. C. 102 F. Supp. 343.

Employers will therefore be dismissed from the case for the reasons stated in those decisions."

⁷ *Quaker City Cab Co. v. Penn.*, 277 U. S. 390; *Terral v. Burke Construction Co.*, 257 U. S. 529; *Frost v. R. R. Comm.*, 271 U. S. 583; *Hanover Fire v. Carr*, 272 U. S. 494; *Security National v. Previtt*, 202 U. S. 246; *Power Mfg. Co. v. Saunders*, 274 U. S. 490; *Schwegman Bros. v. Board*, 43 So. (2) 248.

claimed, doing business in Louisiana so as to give the court jurisdiction over them.

Appellee Employers points out: that the amended complaints by which plaintiffs sought to make the Gillette companies parties were filed without leave of the court; that no order has ever been issued allowing their filing; that no leave has been entered; that, in fact, the district judge sustained the objections of Employers as to the allowance of these complaints. It insists that the sole question for our decision is whether the trial judge abused his discretion in refusing to allow the amendment. It argues that not only [fol. 65] was there no abuse of discretion but that it would have been an abuse to allow their filing.

Insisting that neither Rule 21 nor Rule 25, Federal Rules of Civil Procedure, supports appellants' claim, it points out that Rule 25, providing for the substitution of parties in the case of death, incompetency, transfer of interests, etc., cannot possibly apply to this case, for what was attempted here was not the substitution of a party, but, in effect, the institution of a new suit against a new party.

As to Rule 21, which provides, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just", it quotes Moore's Federal Practice, 2nd Ed., Vol. 3, p. 2907:

"It has been held that Rule 21 is not a substitution rule, but contemplates the retention of a party or parties when another party is added or dropped, and therefore that a sole party or defendant cannot be dropped and another added."

and cites cases in support.*

It, therefore, argues that the court was clearly correct in refusing to allow the supplemental and amended complaints filed by appellants and to permit them to continue with the

* *United States v. Swink*, 41 Fed. Supp. 98; *Schwartz v. Metropolitan Life Ins. Co.*, 2 FRD 167; *Schwartz v. The Olympic, Inc.*, 74 Fed. Supp. 800; and *Davis v. Cohen*, 268 U. S. 68.

suit by the device of recreating it by bringing into it an entirely new party.

[fol. 66] We agree with the appellee that the permitting or refusal of amendments is a matter within the sound discretion of the court and that a rule denying an application to amend will not be disturbed on appeal unless there has been a clear abuse of discretion.

We agree, too, that there was no abuse in this case. Indeed, since the refusal to permit the filing did not in any manner prejudice plaintiffs in their right to sue the defendants separately if they were able to obtain jurisdiction of them, the district judge did not abuse, he used discretion in bringing this action to an end, leaving the controversial matters sought to be injected by the proffered amendments for another action if not another forum.

The judgment of dismissal was right. It is affirmed.

[fol. 67] IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 14316

B. CLINTON WATSON, et ux.

versus

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED, et al.

JUDGMENT—February 27th, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of dismissal of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, B. Clinton Watson, and Another, and the surety on the appeal bond herein, William L. Switzer, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 68] IN THE UNITED STATES COURT OF APPEALS, FIFTH
CIRCUIT

[Title omitted]

PETITION FOR APPEAL—Filed March 7, 1953

The appellants respectfully show that a judgment was rendered in the above-numbered and entitled cause by the Court of Appeals on the 27th day of February, 1953, in the above-entitled cause, affirming the order of the United States District Court for the Western District of Louisiana, Shreveport Division, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Appellants file with this petition their assignment of errors, setting out separately and particularly each error asserted by them.

Appellants present with this petition a separate type-written statement particularly describing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment.

Wherefore, the appellants pray that an appeal be allowed and that the Clerk of the United States Court of Appeals for the Fifth Circuit be directed to send the record and proceedings in this cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of may be reviewed, and if error be found, corrected according to the laws of the United States.

Dated this 7th day of March, 1953.

(S.) Val Irion, (S.) Richard H. Switzer, (S.) Cleve
Burton, Attorneys for Appellants.

[fol. 69] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—March 7, 1953

It appearing to the Court that the appellants have filed their petition for appeal to the Supreme Court of the United States and filed therewith their assignment of errors and also their statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

It is ordeerd that the appeal prayed for be and the same is hereby allowed to the Supreme Court of the United States from the judgment rendered on the 27th day of February, 1953, in the cause entitled B. Clinton Watson, et ux. vs. Employers Liability Assurance Corporation, Ltd., et al, and that appellants give an appeal bond with good and sufficient surety and conditioned according to law in the penal sum of \$500.00.

Thus done and signed on this the 7th day of March 1953.

(S.) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 70] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS

Plaintiffs and appellants file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the judgment and decree of the Court of Appeals for the Fifth Circuit entered on the 27th day of February, 1953, in the case entitled B. Clinton Watson, et ux. vs. Employers Liability Assurance Corporation, Ltd., et al., viz:

The said Court erred:

1. In affirming the judgment of the United States District Court for the Western District of Louisiana, Shreveport

Division, which on the 29th day of September, 1952, dismissed the complaint of plaintiffs upon defendant's motion;

2. In not reversing the judgment of the District Court and in not requiring said defendant to answer the complaint;

3. In not decreeing and adjudging that both of Acts 541 and 542 of the Louisiana Statutes for the year 1950 are valid and applicable to defendant, Employers Liability Assurance Corporation, Ltd., and that said defendant is bound by the Louisiana Law authorizing a direct action against it for any tort committed by its assured in Louisiana to a Louisiana resident;

4. In holding that said Louisiana Statutes are invalid and unconstitutional and repugnant to the Constitution of the United States and that said Statutes violate "the defendant's constitutional rights";

5. In the rendition of the final judgment and decree filed and entered in this case on the 27th day of February, 1953.

(S.) Val Irion, (S.) Richard H. Switzer, (S.) Cleve Burton, Attorneys for Appellants.

[fols. 71-72] Bond on appeal for \$500.00 approved and filed March 10, 1953, omitted in printing.

[fol. 73] Citation in usual form showing service on Benjamin C. King, omitted in printing.

[fols. 74-89] Statement directing attention to the provisions of paragraph 3, rule 12 of the Supreme Court, (omitted in printing).

[fol. 90] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed March 10, 1953

To the Clerk of the United States Court of Appeals, Fifth Circuit:

You are hereby requested to prepare a transcript of the record in this cause and to transmit it to the Clerk of the Supreme Court of the United States at Washington, D.C., duly certified and authenticated and within the time prescribed by the Rules of the Supreme Court of the United States, consisting of the following documents and portions of the record in this cause, which constitute the record on appeal to the Supreme Court of the United States:

1. The entire record on appeal to the Court of Appeals, Fifth Circuit, with the exception of the affidavits of Milton C. Trichel, Jr., Richard H. Switzer, Boone Gross, and Sheldon Flynn, and with the exception of all supplemental petitions and motions filed solely by Gillette Safety Razor Company and The Gillette Company and by Sheldon Flynn;
2. All pleadings filed in the Court of Appeals, Fifth Circuit, following the filing of the transcript of appeal;
3. Opinion of the Court of Appeals;
4. Minutes of the Court of Appeals;
5. Petition for Appeal;
6. Order allowing appeal;
- [fol. 91] 7. Assignment of Errors;
8. Bond;
9. Citation on Appeal;
10. Notice on Appeal;
11. Jurisdictional Statement;
12. Praeceptum for Record.

Dated this 7th day of March, 1953.

(Signed) Val Irion, Richard H. Switzer, Cleve Burton, Attorneys for Appellants.

[fol. 92] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

COUNTER-PRAECIPE—Filed March 13, 1953

To the Clerk of the United States Court of Appeals, Fifth Circuit:

In preparing the transcript of record in the above entitled cause on the appeal of plaintiffs-appellants, taken March 7, 1953, please include in said transcript the following:

1. Those portions of the entire record on appeal to the Court of Appeals, Fifth Circuit, which were not designated by plaintiffs-appellants in their praecipe for record dated March 7, 1953, including the affidavits of Milton C. Trichel, Jr., Richard H. Switzer, Boone Gross, and Sheldon Flynn, and all supplemental petitions and motions filed by Gillette Safety Razor Company and The Gillette Company and by Sheldon Flynn.
2. This counter-praecipe, together with proof of service thereof.

Dated this 12th day of March, 1953.

(Signed) Benjamin C. King, Charles D. Egan, Attorneys for Appellees.

[fol. 93] *Duly sworn to by Benjamin C. King. Jurat omitted in printing.*

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

B. CLINTON WATSON, et ux., Appellants,

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., et al.,
Appellee

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed
March 27, 1953

Pursuant to Rule 13, Paragraph 9, of the Revised Rules of this Court, Appellants state that they intend to rely upon all the points in their Assignment of Errors.

Appellants deem the entire record, as filed in the above entitled cause, necessary for consideration of the points relied upon.

Dated this 25th day of March, 1953.

Val Irion, Richard H. Switzer, Cleve Burton, Attorneys for Appellants.

[fol. 96-97] Proof of service omitted in printing.

[fol. 98] [File endorsement omitted.]

[fols. 99-100] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 29

[Title omitted]

ORDER POSTPONING JURISDICTION—May 3, 1954

Appeal from and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit

The statement of jurisdiction in this case having been submitted and considered by the Court, further considera-

tion of the question of the jurisdiction of this Court in this case on appeal is postponed to the hearing of the case on the merits. The petition for writ of certiorari is granted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

[fol. 101] SUPREME COURT OF THE UNITED STATES, OCTOBER
Term, 1953

ORDER ALLOWING CERTIORARI—Filed May 3, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.



DECLARATIONS

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

Item 1. Name of Insured The Toni Company, A Division of the Gillette Safety Razor Company &/or The Bobbi Company &/or Associated &/or Affiliated &/or Subsidiary Companies
Address (No., street, town, county, state) 456 Merchandise Mart, Chicago, Ill. 1200
The business of the named insured is

LOCATIONS OF ALL PREMISES OWNED, RENTED OR CONTROLLED BY NAMED INSURED	INTEREST OF NAMED INSURED IN SUCH PREMISES (Owner, General Lessee, Tenant)	PART OCCUPIED BY NAMED INSURED
332 Rosabel St., b/a 281-299 East 4th Street St. Paul, Minn.	Tenant	B-1-2-3-5 Floor
456 Merchandise Mart, Chicago, Ill.	Tenant	4th Floor

Item 2. Policy Period: 1 year From July 1, 1951 to July 1, 1952 12:01 A. M.
standard time at the address of the named insured as stated herein.

Item 3. Coverages	Limits of Liability	Advance Premiums
Coverage A—Bodily Injury Liability—Automobile	\$ each person \$ each accident	\$
Coverage B—Bodily Injury Liability—Except Automobile	\$ each person \$ each accident	\$ 35,000.00
See End. Attached for Products	\$ aggregate products	
Coverage C—Property Damage Liability—Automobile	\$ each accident	\$
	\$ each accident	
	\$ aggregate operations	
Coverage D—Property Damage Liability—Except Automobile	\$ aggregate protective	\$
	\$ aggregate products	
	\$ aggregate contractual	
Total Advance Premium		\$ 35,000.00

For three year policy, the Estimated Premium is _____
Payable \$ _____ in advance \$ _____ on first anniversary \$ _____ on second anniversary.

Item 4. The declarations are completed on attached schedules designated
No Exceptions

Item 5. (a) The schedules disclose all hazards insured hereunder known to exist at the effective date of this policy; (b) the schedules contain a complete list of all automobiles and trailers owned by the named insured at the effective date of this policy and the purposes of use thereof; (c) the schedules contain a complete list of all persons within the definition of Class 1 persons, at the effective date of this policy; (d) during the past year no insurer has canceled any similar insurance issued to the named insured; Exception, if any, to (a), (b), (c) or (d):

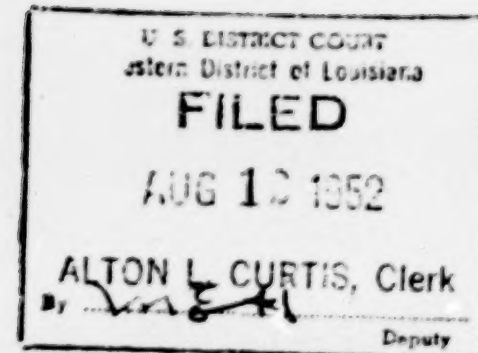
No exceptions

COUNTERSIGNED AT
ON Boston, Mass.
May 23, 1952

Authorized Agent.

no. 3700 - civil - 2.

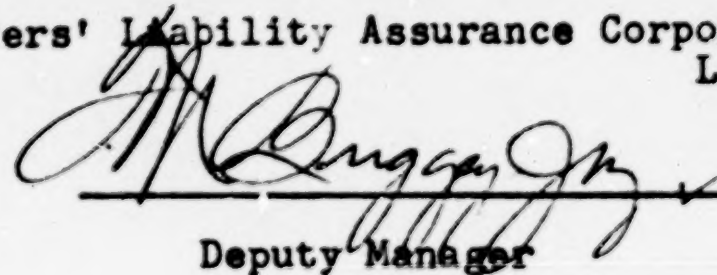
CERTIFICATION



no.
3700
civil

This is to certify that the attached is an exact copy of Policy No. C.L. 8523600, issued by The Employers' Liability Assurance Corporation, Limited, to The Toni Company, a Division of the Gillette Safety Razor Company and/or The Bobbi Company and/or Associated and/or Affiliated and/or Subsidiary Companies, 456 Merchandise Mart, Chicago, Ill.

The Employers' Liability Assurance Corporation,
Limited


Deputy Manager

May 27, 1952

This endorsement is effective July 1, 1951 for attachment to Policy No. CI 8523600



issued to The Ioni Company, etal

by The Employers' Liability Assurance Corp., Ltd.
(Name of Insurance Company)

In consideration of the deposit premium at which this Policy is written, it is understood and agreed that the Assured will, at the end of each period of three months from the date of the Policy, furnish the Corporation with a written statement showing the actual amount of remuneration earned by employees during that period and will within ten days after the expiration of each such period, pay to the Corporation a premium computed at the rate or rates specified in the schedule of the Policy for each One Hundred Dollars (\$100.00) of such remuneration.

It is further understood and agreed that the deposit premium under this Policy shall be applied against the audit for the final period.

This Policy is hereby amended as herein specifically stated but not otherwise.

Countersigned _____
(Authorized Representative)

G3361 Deposit Premium Endorsement
Printed in U. S. A.

1b

- (3) the word "cost" means the total cost of all operations performed for the named insured during the policy period by independent contractors on each separate project, including materials used or delivered for use, except maintenance or ordinary alterations and repairs on premises owned or rented by the named insured;
 - 4) the word "sales" means the gross amount of money charged by the named insured or by others trading under his name for all goods and products sold or distributed during the policy period, and charged during the policy period for installation, servicing or repair, and includes taxes, other than taxes which the named insured and such others collect as a separate item and remit directly to a governmental division;
 - 5) the words "cost of hire" mean the amount incurred for hired automobiles, including remuneration of the named insured's chauffeurs employed in the operation of such automobiles;
 - (6) the words "Class 1 persons" mean the following persons, provided their usual duties in the business of the named insured include the use of non-owned automobiles: (a) all employees, including officers, of the named insured compensated for the use of such automobiles by salary, commission, terms of employment, or specific operating allowance of any sort; (b) all direct agents and representatives of the named insured;
 - (7) the words "Class 2 employees" mean all employees, including officers, of the named insured, not included in Class 1 persons.
- The named insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.
2. **Inspection and Audit.** The company shall be permitted to inspect the insured premises, operations, automobiles and elevators and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.
 3. **Definitions.** (a) **Contract.** The word "contract" means a warranty of goods or products or, if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement, or elevator or escalator maintenance agreement.
 - (b) **Automobile.** Except where stated to the contrary, the word "automobile" means a land motor vehicle or trailer as follows:

4. **Limits of Liability. Coverages A and B.** The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.
5. **Limits of Liability—Products. Coverages B and D.** The limits of bodily injury liability and property damage liability stated in the declarations as "aggregate products" are respectively the total limits of the company's liability for all damages arising out of the products hazard. All such damages arising out of one prepared or acquired lot of goods or products shall be considered as arising out of one accident.
6. **Limits of Liability. Coverage D.** The limit of property damage liability stated in the declarations as "aggregate operations" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by the ownership, maintenance or use of premises or operations rated upon a remuneration premium basis or by contractors' equipment rated on a receipts premium basis. The limit of property damage liability stated in the declarations as "aggregate protective" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by operations performed for the named insured by independent contractors or omissions or supervisory acts of the insured in connection therewith, except maintenance or ordinary alterations and repairs on premises owned or rented by the named insured. The limit of property damage liability stated in the declarations as "aggregate contractual" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, with respect to each contract. These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured.
7. **Limits of Liability.** The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

(1) **Owned Automobile**—an automobile owned by the named insured;

(2) **Hired Automobile**—an automobile used under contract in behalf of, or loaned to, the named insured provided such automobile is not owned by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile;

(3) **Non-Owned Automobile**—any other automobile.

The following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described: any crawler-type tractor, farm implement, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer, mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type, and, if not subject to motor vehicle registration, any equipment used principally on premises owned by or rented to the named insured, farm tractor or trailer.

(c) **Semitrailer.** The word "trailer" includes semitrailer.

(d) **Two or More Automobiles.** The terms of this policy apply separately to each automobile insured hereunder, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability.

(e) **Purposes of Use.** The term "pleasure and business" is defined as personal, pleasure, family and business use. The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes. Use of an automobile includes the loading and unloading thereof.

(f) **Products Hazard.** The term "products hazard" means

(1) the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured or on premises for which the classification stated in division (a) of the declarations or in the company's manual excludes any part of the foregoing;

(2) operations, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the insured, except (a) pick-up and delivery, (b) the existence of tools, uninstalled equipment and abandoned or unused materials and (c) operations for which the classification stated in division (a) of the declarations or in the company's manual specifically includes completed operations; provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

(g) **Assault and Battery.** Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

8. **Financial Responsibility Laws.** Coverages A and C. Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

9. **Notice of Accident.** When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

10. **Notice of Claim or Suit.** If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

11. **Assistance and Cooperation of the Insured.** The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

12. **Action Against Company.** No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

13. **Other Insurance.** If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise.



It is agreed that, subject to the following provisions, the Company will pay the named Insured for any loss of or damage to

- (a) any elevator described in the schedule of this endorsement, or,
 (b) any other property owned, rented, occupied or used by the named Insured
 (hereinafter called loss) arising out of the ownership, operation or use of said elevator and caused by collision of said elevator or anything carried thereon, with another object.

The insurance afforded by this endorsement does not apply to any loss or damage:

- A. due directly or indirectly to fire, lightning, inundation, tornado or cyclone; nor shall the Company be liable for repairs or replacements due to wear or depreciation;
 B. due directly or indirectly to the making of additions to, alterations in or the extraordinary repair of any elevator, or due to the operation or use of any elevator while such additions, alterations or repairs are in progress, unless a written permit describing the work to be undertaken is granted by the Company;
 C. arising out of liability assumed by the Insured under any contract or agreement;
 D. to any electrical machine by reason of breaking, burning out or disruption thereof;
 E. due directly to the breaking, burning out or disrupting of any electrical machine not located in the elevator car;
 F. to any property in the care, custody or control of the Insured other than property owned, rented, occupied or used by the Insured;
 G. arising from loss of use of
 (1) property, or (2) elevators.

Limit of Liability \$

each accident

SCHEDULE

Location of Elevator	Location on Premises	Type	Purpose of Use	Number on Premises	Number Insured	Rate Per Elevator	Premium

Total Premium \$

This endorsement is effective July 1, 1951

This policy is amended as herein specifically stated but not otherwise.

For attachment to Policy No. CL 8523600 issued to The Tool Company, et al

by The Employers' Liability Assurance Corp., Ltd.
 (Name of Insurance Company)

Counter signed

(Authorized Representative)

G2923-1 Elevator Collision Endorsement

Printed in U. S. A.

PROVISIONS

1. **Policy Terms.** All terms of the policy not inconsistent with the terms of this endorsement, apply to the insurance afforded by this endorsement.

2. **Endorsement Period.** This endorsement applies only to losses sustained during the effective period of this endorsement.

3. **Definition.** The word "elevator" wherever used in this endorsement shall mean the elevator cars and the parts of any machinery or appliances necessary to the use, maintenance or operation thereof.

4. **Notice of Loss.** In the event of loss, the named Insured shall give notice in writing thereof as soon as practicable to the Company or any of its authorized agents.

5. **Inspection.** The Company shall have reasonable time and opportunity to examine the damaged property of the Insured before replacement or repairs are undertaken or physical evidence of the damage removed, but the Insured shall not be prejudiced hereunder by any act on his part or in his behalf undertaken for the protection or salvage of the damaged property.

6. **Proof of Loss.** Within sixty days after the occurrence of loss unless such time is extended in writing by the Company, proof of loss is to be filed with the Company in the form of a sworn statement of the named Insured setting forth the interest of the named Insured and of all others in the property affected, any encumbrance thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, and the description and amounts of all other insurance covering such property.

7. **Payment of Loss.** Action Against Company. The amount of loss or reimbursement for which the Company is liable shall not be payable nor shall action lie against the Company upon any claim for loss or reimbursement hereunder until thirty (30) days after proof of loss is filed and the amount of loss is determined as herein provided, nor unless

the named Insured shall otherwise have complied with all the terms and conditions of this policy.

8. **Appraisal; Waiver.** If the Insured and the Company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty (60) days after receipt of proof of loss by the Company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen (15) days to agree upon such umpire, then, on the request of the Insured or the Company, such umpire shall be selected by a judge of a court of record in the county and state in which appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their difference to the umpire. An award in writing of any two shall determine the amount of loss.

The Insured and the Company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The Company shall not be held to have waived any of the terms of this policy by any requirements, act or proceeding on its part relating to the appraisal or to any examination provided for in this policy.

9. **Limits of Liability; No Abandonment.** The Company's liability for loss shall not exceed the actual cash value of the insured property at the time of loss nor what it would then cost to repair or replace either the insured property or any part thereof with other of like kind or quality, with proper deduction for depreciation from any cause and shall in no event exceed the limits of liability stated herein.

10. **Automatic Reinstatement.** When the elevator is damaged, whether or not such damage is covered under this policy, the liability of the Company shall be reduced by the amount of such damage until repairs have been completed, but shall then attach as originally written without additional premium.

THE EMPLOYERS' LIABILITY INSURANCE CORPORATION, LIMITED

(A Stock Insurance Company known as the Company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. Coverage A—Bodily Injury Liability—Automobile.

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of any automobile.

Coverage B—Bodily Injury Liability—Except Automobile.

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

Coverage C—Property Damage Liability—Automobile.

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.

Coverage D—Property Damage Liability—Except Automobile.

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

II. Defense, Settlement, Supplementary Payments.

As respects the insurance afforded by the other terms of this policy the company shall:

- (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;
- (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of automobile accident or automobile traffic law violation during the policy period, not to exceed the usual charges of surety companies nor \$100 per bail bond, but without any obligation to apply for or furnish any such bonds;
- (c) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;
- (d) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

- (e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.

III. Definition of "Insured."

The unqualified word "insured" includes the named insured and also includes (1) under coverages B and D, any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such, except with respect to the ownership, maintenance or use of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining, and (2) under coverages A and C, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, and any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured. The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement:

- (a) with respect to an automobile while used with any trailer owned or hired by the insured and not covered by like insurance in the company; or with respect to a trailer while used with any automobile owned or hired by the insured and not covered by like insurance in the company;
- (b) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;
- (c) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of an automobile in the business of such employer;
- (d) with respect to any hired automobile, to the owner thereof or any employee of such owner;
- (e) with respect to any non-owned automobile, to any executive officer if such automobile is owned by him or a member of his household.

IV. Policy Period, Territory.

This policy applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, Canada or Newfoundland. With respect to automobiles this policy also applies to accidents which occur during the policy period while the automobile is being transported between ports thereof.

EXCLUSIONS

This policy does not apply:

- (a) to liability assumed by the insured under any contract or agreement except under coverages B and D, a contract as defined herein;
- (b) under Coverages B and D, except with respect to operations performed by independent contractors, to watercraft while away from premises owned, rented or controlled by the named insured, automobiles while away from such premises or the ways immediately adjoining, or aircraft, or the loading or unloading thereof;
- (c) under Coverages A and B, except with respect to liability assumed under contract covered by this policy, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;
- (d) under Coverage A, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;
- (e) under Coverage B, except with respect to liability assumed under contract covered by this policy, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment of the insured;

- (f) under Coverage C, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;
- (g) under Coverage D, to injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the insured, or (3) any goods or products manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises;
- (h) under Coverage D, except with respect to liability assumed under contract covered by this policy and except in so far as this exclusion is stated in the declarations to be inapplicable, to (1) the discharge, leakage or overflow of water or steam from plumbing, heating, refrigerating or air-conditioning systems, elevator tanks or cylinders, standpipes for fire hose, or industrial or domestic appliances, or any substance from automatic sprinkler systems, (2) the collapse or fall of tanks or the component parts or supports thereof which form a part of automatic sprinkler systems, or (3) rain or snow admitted directly to the building interior through defective roofs, leaders or spouting, or open or defective doors, windows, skylights, transoms or ventilators, in so far as any of these occur on or from premises owned or rented by the named insured and injure or destroy buildings or contents thereof.

CONDITIONS

The conditions, except Conditions 4, 5, 6 and 8, apply to all coverages. Conditions 4, 5, 6 and 8 apply only to the coverage or coverages noted thereunder.

1. **Premium.** The premium bases and rates for the hazards described in the declarations are stated therein. Premium bases and rates for hazards not so described are those applicable in accordance with the manuals in use by the company. An average percentage reduction is to be computed in accordance with the following table and applied to the premiums for all owned automobiles.

Premium Reduction Table		
Number of Licensed Owned Automobiles, Exclusive of Trailers, Insured Hereunder (computed pro rata if less than the policy period)		Percentage Reduction
1st	5	0%
Next	15	10%
Next	30	15%
Next	50	20%
All over	100	25%

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

When used as a premium basis:

- (1) the word "remuneration" means (a) the entire remuneration earned during the policy period by all employees of the named insured, other than drivers of teams or automobiles and aircraft pilots and co-pilots, subject to any overtime earnings or limitation of remuneration rule applicable in accordance with the manuals in use by the company, and subject with respect to each executive officer to a maximum and a minimum of \$100 and \$30 per week, and (b) the remuneration of each proprietor at a fixed amount of \$2,000 per annum;
- (2) the word "receipts" means the gross amount of money charged by the named insured for such operations by the named insured or by others during the policy period as are rated on a receipts basis, and includes taxes, other than taxes which the named insured collects as a separate item and remits directly to a governmental division;

Form A324
AUTOMOBILE FLEET PLAN
(Fleet Automatic)

This endorsement, effective July 1, 1951, forms a part of policy No. CL 8523600
(12:01 A.M., standard time)

issued to The Toni Company, etal

by The Employers' Liability Assurance Corp., Ltd.

SCHEDULE

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges:

Town or City and State in Which the Automobile Will Be Principally Garaged	Year of Model	Trade Name	Body Type and Model; Truck Size; Tank Gal. Capacity; or Bus Seating Capacity	Serial No. Motor No.	Purposes of Use	Advance Premiums		
						Bodily Injury Liability	Property Damage Liability	Medical Payments
Total Advance Premiums						\$	\$	\$

It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, for Property Damage Liability and for Medical Payments applies with respect to owned automobiles subject to the following provisions:

1. **Definitions.** The words "owned automobile" shall mean a land motor vehicle, trailer or semitrailer owned by the named insured, provided the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described: any crawler-type tractor, farm implement, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer, mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type, and, if not subject to motor vehicle registration, any equipment used principally on premises owned by or rented to the named insured, farm tractor or trailer. The word "automobile" whenever used in the policy with respect to the insurance afforded under this endorsement, shall include "owned automobile".

2. **Application of Insurance.** The insurance applies to all licensed owned automobiles and to all owned trailers, including such automobiles and trailers acquired during the policy period, used for the purposes stated in the schedule forming a part hereof. The definitions in the policy of "commercial" and "pleasure and business" apply respectively to automobiles of the commercial or truck type and to automobiles of the private passenger type except as otherwise provided.
3. **Premium.** The premium basis for this insurance is per automobile. The premium stated in the declarations is an estimated premium only and, except where specifically stated to the contrary, the premium reduction percentage determined in accordance with the premium reduction table forming a part hereof, including on a pro rata basis each licensed owned automobile, exclusive of trailers, insured hereunder for less than the policy period, is applicable to the premium for each automobile insured hereunder. Upon termination of the policy, the earned premium shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid for this insurance, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

Premium Reduction Table		
Number of Licensed Owned Automobiles, Exclusive of Trailers		Percentage Reduction
1st	5	0%
Next	15	10%
Next	30	15%
Next	50	20%
All over	100	25%
An average percentage reduction applicable to the premiums for all owned automobiles insured hereunder is to be computed in accordance with this table.		

The named insured shall maintain records of the information necessary for premium computation on the basis stated in the schedule, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

4. **Inspection and Audit.** The company shall be permitted to inspect the insured automobiles and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of the policy, as far as they relate to the premium basis or the subject matter of this insurance.
5. **Declarations.** The named insured declares that the schedule contains a complete list of all automobiles and trailers owned by him at the effective date of the policy and the purposes of use thereof, except as therein stated.



.....
Authorized Representative

DECLARATIONS — SCHEDULE
GENERAL LIABILITY

 General—Automobile Liability Policy (Comprehensive Form) No. **C. L.** 8523600

DESCRIPTION OF HAZARDS	CODE NO.	PREMIUM BASES	RATES		ADVANCE PREMIUMS	
			COV. B	COV. D	COVERAGE B BODILY INJURY LIABILITY	COVERAGE D PROPERTY DAMAGE LIABILITY
DIVISION a. PREMISES—OPERATIONS			(a) Per 100 Sq. Ft. Area (b) Per Linear Ft. Frontage (c) Per \$100 Remuneration			
Purposes of Use—Classification of Operations		(a) Area (b) Frontage (c) Estimated Annual Remuneration				
DIVISION b. ELEVATORS			ADVANCE PREMIUMS DIVISION a		\$	\$
Location on Premises—Purposes of Use		NUMBER INSURED	PER ELEVATOR			
DIVISION c. INDEPENDENT CONTRACTORS—LET OR SUBLET WORK			ADVANCE PREMIUMS DIVISION b		\$	\$
Description of Work to be Performed		COST	PER \$100 OF COST			

DIVISION d. PRODUCTS—INCLUDING COMPLETED OPERATIONS		ADVANCE PREMIUMS DIVISION c		\$	\$
Description of Products	SALES	PER \$1000 OF SALES			
See Endorsement Attached					
DIVISION e. CONTRACTUAL		ADVANCE PREMIUMS DIVISION d		\$	35,000.00
Names of Parties, Date and Type of Agreement	NUMBER INSURED	PER CONTRACT			
		ADVANCE PREMIUMS DIVISION e		\$	\$
DIVISION f. SPECIAL COVERAGE PREMIUMS				\$	\$
		TOTAL ADVANCE PREMIUMS		\$	35,000.00

SHORT RATE CANCELATION TABLE

FOR TERM OF ONE YEAR

Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium
1	5	154-156	53
2	6	157-160	54
3-4	7	161-164	55
5-6	8	165-167	56
7-8	9	168-171	57
9-10	10	172-175	58
11-12	11	176-178	59
13-14	12	179-182 (6 mos.)	60
15-16	13	183-187	61
17-18	14	188-191	62
19-20	15	192-196	63
21-22	16	197-200	64
23-25	17	201-205	65
26-29	18	206-209	66
30-36 (1 mo.)	19	210-214 (7 mos.)	67
37-40	20	215-218	68
41-43	21	219-223	69
44-47	22	224-228	70
48-51	23	229-232	71
52-54	24	233-237	72
55-58	25	238-241	73
59-62 (2 mos.)	26	242-246 (8 mos.)	74
63-65	27	247-250	75
66-69	28	251-255	76
70-73	29	256-260	77
74-76	30	261-264	78
77-80	31	265-269	79
81-83	32	270-273 (9 mos.)	80
84-87	33	274-278	81
88-91 (3 mos.)	34	279-282	82
92-94	35	283-287	83
95-98	36	288-291	84
99-102	37	292-296	85
103-105	38	297-301	86
106-109	39	302-305 (10 mos.)	87
110-113	40	306-310	88
114-116	41	311-314	89
117-120	42	315-319	90
121-124 (4 mos.)	43	320-323	91
125-127	44	324-328	92
128-131	45	329-332	93
132-135	46	333-337 (11 mos.)	94
136-138	47	338-342	95
139-142	48	343-346	96
143-146	49	347-351	97
147-149	50	352-355	98
150-153 (5 mos.)	51	356-360	99
	52	361-365 (12 mos.)	100

FOR POLICIES WITH TERMS LESS THAN, OR GREATER THAN, 12 MONTHS:

- If policy has been in force for 12 months or less: apply the standard short rate table for annual policies to the full annual premium determined as for a policy written for a term of one year.
- If policy has been in force for more than 12 months:
 - Determine full annual premium as for a policy written for a term of one year.
 - Deduct such premium from the full policy premium, and on the remainder calculate the pro rata earned premium on the basis of the ratio of the length of time beyond one year the policy has been in force to the length of time beyond one year for which the policy was originally written.
 - Add premium produced in accordance with items (1) and (2) to obtain earned premium during full period policy has been in force.

GENERAL—AUTOMOBILE LIABILITY POLICY

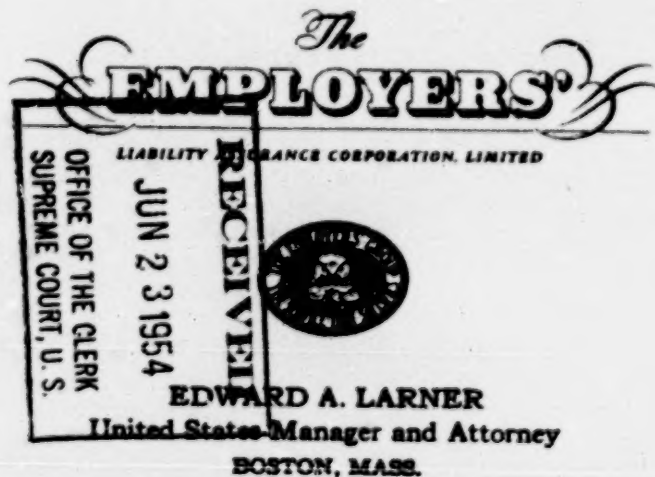
(Comprehensive Form)

No. **C.L.** 8523600

Expires July 1, 1952

Premium \$ 35,000.00

Insured The Toni Company, etal
Chicago, Ill.



Boit, Dalton & Church

DECLARATIONS — SCHEDULE
AUTOMOBILE LIABILITY

General—Automobile Liability Policy (Comprehensive Form) No. C. L.

DESCRIPTION OF HAZARDS		IN PURPOSE OF USE COLUMNS THE LETTER "C" MEANS COMMERCIAL AND THE LETTERS "P & B" MEAN PLEASURE AND BUSINESS, EACH AS DEFINED IN THE POLICY			ADVANCE PREMIUMS	
DIVISION 1 — OWNED AUTOMOBILES					COVERAGE A BODILY INJURY LIABILITY	COVERAGE C PROPERTY DAMAGE LIABILITY
Premium Basis — Per Automobile						
TOWN, COUNTY AND STATE IN WHICH THE AUTO. MOBILE WILL BE PRINCIPALLY GARAGED	TRADE NAME, BODY TYPE AND MODEL, TRUCK LOAD CAPACITY	YEAR OF MODEL	(M) MOTOR NUMBER (S) SERIAL NUMBER	PURPOSES OF USE		
DIVISION 2 — HIRED AUTOMOBILES					ADVANCE PREMIUMS FOR DIVISION 1	
Premium Basis — Cost of Hire					\$	\$
TYPES HIRED	LOCATIONS WHERE AUTOMOBILES WILL BE PRINCIPALLY USED	PURPOSES OF USE	ESTIMATED COST OF HIRE	RATES PER \$100 COST OF HIRE		
				COV. A	COV. C	

DIVISION 3 — NON-OWNED AUTOMOBILES		Premium Basis—Class 1 Persons and Class 2 Employees		ADVANCE PREMIUMS DIVISION 2		\$	\$				
CLASS 1 PERSONS—NAME OF EACH		LOCATION OF HEADQUARTERS OF PERSONS NAMED HEREIN									
CLASS 2 EMPLOYEES ESTIMATED AVERAGE NUMBER		LOCATION OF HEADQUARTERS OF CLASS 2 EMPLOYEES		RATES PER EMPLOYEE							
				<table border="1"> <tr> <td>COV. A</td> <td>COV. C</td> </tr> <tr> <td></td> <td></td> </tr> </table>		COV. A	COV. C				
COV. A	COV. C										
				<table border="1"> <tr> <td colspan="2">ADVANCE PREMIUMS DIVISION 3</td> </tr> <tr> <td>\$</td> <td>\$</td> </tr> </table>		ADVANCE PREMIUMS DIVISION 3		\$	\$		
ADVANCE PREMIUMS DIVISION 3											
\$	\$										
DIVISION 4 — SPECIAL COVERAGE PREMIUMS — AUTOMOBILE				MINIMUM PREMIUM DIVISION 3		\$	\$				
1. Independent Contractors (Automobile)											
2. Medical Payments Auto.—see endorsement											
3. Surcharge Minimum Premium: \$ _____ BI; \$ _____ PD											
				TOTAL ADVANCE PREMIUMS		\$	\$				

The Employers' Liability Assurance Corporation, Limited
BOOK SCHEDULE ENDORSEMENT

For Use of Insured

Endorsement No. 1
 Page 1
 Policy No. CL R523600

Insured The Tonn Company, etal

Effective July 1, 1951

It is agreed that wherever used in this endorsement:

The term "incurred losses" shall mean both losses paid and losses unpaid, each as hereinafter defined;

The term "Losses Paid" shall mean the amounts actually paid under this Policy by the Company for settlement of claims, allocated claims expense and in satisfaction of judgements, including interest thereon, rendered against the insured in any civil proceedings by a court of competent jurisdiction;

The term "Losses unpaid" shall mean those reserves set up by the company as its best estimate of the probable amount to be paid under this Policy by the Company for settlement of claims, allocated claims expense and in satisfaction of judgements, including interest thereon, rendered against the insured in any civil proceedings by a court of competent jurisdiction;

The term "Allocated claims expense" shall mean the expenses incurred by the Company in connection with the investigation, adjustment and trial of accidents, claims and suits which would not be included in the work ordinarily done by a claim department, thus including amounts actually paid by the Company: 1. To attorneys, doctors, experts, appraisers, photographers, printers, stenographers (Not on salary in employ of company) for services in connection with the investigation and settlement of claims and the defense of legal proceedings as defined in this Policy. 2. for cost of release of attachment, removal and appeal bonds; and 3. For fees and expenses of witnesses

The Premium for this Policy shall be the sum of:

- (a) The incurred losses, subject to a limit of \$10,000. per accident plus actual allocated claims expenses; and
- (b) That percentage of the incurred losses set forth in the table of factors opposite the applicable incurred loss figure as developed under section (A) Above; and

Date Issued _____

Agent or Broker _____

Sub-Agent or Sub-Broker _____

FORM 100-100-100-100-100

The Employers' Liability Assurance Corporation, Limited

BOOK SCHEDULE ENDORSEMENT

For Use of Insured

Endorsement No. 1

Page 2
Policy No. CL 8523600

Insured The Toni Company, et al

(c) The incurred losses under this Policy which are not included in section (a) Above.

The minimum premium for this Policy shall be \$16,500.

Computation of Cost Plus Premium.

As soon as practicable, the Company shall determine the amount of incurred losses as of December 31, 1951 and shall make the initial computation of cost plus premium therefrom.

Corresponding computations shall be made on losses as of June 30, 1952, December 31, 1952, June 30, 1953, December 31, 1953, June 30, 1954, December 31, 1954 and June 30, 1955.

The Computation made on losses as of June 30, 1955 shall constitute the final premium due and payable unless further computations are requested by the insured.

Payment of Premium

The named insured shall pay to the Company at inception date of the Policy a deposit premium of \$35,000. which shall be retained until June 3, 1953.

At the time of the initial computation of the Cost plus premium the named insured shall pay to the company the earned cost plus premium.

On each subsequent computation of cost plus premium, if the earned cost plus premium is in excess of the prior cost plus premium the named insured shall pay the difference to the Company, if less, the company shall return the excess to the named Insured.

Agreed to by: _____

TITLE

Date Issued _____

Agent or Broker _____ Sub-Agent or Sub-Broker _____

FORM 100-100-100-100-100

The Employers' Liability Assurance Corporation, Limited
BOOK SCHEDULE ENDORSEMENT

For Use of Insured

Endorsement No. 1

Page 3
Policy No.

CL-8523600

Insured The Toni Company, et al

TABLE OF FACTORSINCURRED LOSSES

Below \$250

\$250 to \$499

\$500 to \$749

\$750 to \$999

\$1,000 to \$1,999

\$2,000 to \$2,999

\$3,000 to \$3,999

\$4,000 to \$4,999

\$5,000 to \$7,499

\$7,500 to \$9,999

\$10,000 to \$12,499

\$12,500 to \$14,999

\$15,000 to \$17,499

\$17,500 to \$19,999

\$20,000 to \$22,499

\$22,500 to \$24,999

\$25,000 to \$27,499

\$27,500 to \$29,999

\$30,000 to \$32,499

\$32,500 to \$34,999

\$35,000 to \$37,499

\$37,500 to \$39,999

\$40,000 to \$42,499

\$42,500 to \$44,999

\$45,000 to \$49,999

\$50,000 to \$54,999

\$55,000 to \$59,999

\$60,000 to \$64,999

FACTOR

Minimum premium applies

3,830.3%

2,657.6%

1,903.8%

1,118.3%

678.4%

489.9%

385.1%

282.5%

207.1%

165.2%

138.5%

120.0%

106.5%

96.2%

88.0%

79.4%

74.1%

69.7%

65.9%

62.3%

59.8%

57.3%

55.1%

51.8%

49.0%

46.4%

44.1%

Date Issued _____

Agent or Broker _____ Sub-Agent or Sub-Broker _____

FORM PRINTED IN U. S. A.

The Employers' Liability Assurance Corporation, Limited
BOOK SCHEDULE ENDORSEMENT

For Use of Insured

Endorsement No. 1
Page 4
Policy No. CI-3523600

Insured
The Toni Company, etal

TABLE OF FACTORS

CONTINUED

INCURRED LOSSES

FACTOR

\$65,000 to \$69,999	42.2%
\$70,000 to \$79,999	39.9%
\$80,000 to \$89,999	38.6%
\$90,000 to \$99,999	36.5%
\$100,000 to \$109,999	34.8%
\$110,000 to \$119,999	33.4%
\$120,000 to \$129,999	32.2%

Date Issued _____

Agent or Broker _____ Sub-Agent or Sub-Broker _____

LINE PRINTED IN U. S. A.

14. **Subrogation.** In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.
15. **Three Year Policy.** A policy period of three years is comprised of three consecutive annual periods. Rates for hazards described in divisions 1, 2 and 3 of the Description of Hazards are subject to amendment for the second and third annual periods in accordance with the company's rules and rating plans. Amended rates shall be stated by endorsement issued to form a part of the policy. Computation and adjustment of earned premium shall be made at the end of each annual period. Aggregate limits of liability as stated in this policy shall apply separately to each annual period in the same manner in which they would apply if the policy period were one year.
16. **Changes.** Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized representative of the company.
17. **Assignment.** Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under Coverages A and C, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary

custody of any owned automobile or hired automobile, as an insured, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

18. **Cancellation.** This policy may be canceled by the named insured by mailing to the company written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

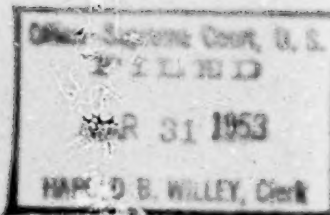
If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

19. **Terms of Policy Conformed to Statute.** Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes.
20. **Declarations.** By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, The Employers' Liability Assurance Corporation, Limited, has caused this policy to be executed by its authorized Manager acting under power of attorney, and countersigned on the declarations page by a duly authorized agent of the company.

Edward A. Kerner
United States Manager and Attorney.

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SUPREME COURT. U. S.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952 1953

No. 603 29

B. CLIFTON WATSON, ET UX,

Appellants,

vs.

EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

STATEMENT AS TO JURISDICTION

VAL IRION,
RICHARD H. SWITZER,
CLEVE BURTON,
Counsel for Appellants.

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IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No 14316

B. CLIFTON WATSON, ET UX,

vs.

Appellants,

EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL.,

Appellees

JURISDICTIONAL STATEMENT

Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Title 28, U. S. Code, Paragraph 1254 (2), as revised by the Act of June 25, 1948.

Date of Judgment and Application for Appeal

The final judgment of the Court of Appeals for the Fifth Circuit was entered February 27, 1953, sub nom. B. Clinton Watson, et ux vs. Employers Liability Assurance Corporation, Ltd., et al.

Application for appeal is herewith presented on the 7th day of March, 1953.

Louisiana Statute Validity of Which Is Involved

The statute of the State of Louisiana, the validity of which is involved, is the Louisiana law relating to a direct action against the liability insurer of a tort-feasor, who

commits a tort in Louisiana, irrespective of where the policy of liability insurance may have been written or delivered to the assured, which statutes are Acts 541 and 542 of the Louisiana Legislature for the year 1950.

In this cause Employers Liability Assurance Corporation, Ltd., wrote a policy of public liability insurance for and on behalf of The Gillette Company, the tort-feasor, which is a Delaware Corporation. The policy was written in the State of Massachusetts and delivered to the assured tort-feasor, in the State of Illinois. The appellants-plaintiffs were damaged by The Gillette Company in Bienville Parish, Louisiana, on or about the 9th of November, 1951, by negligence of The Gillette Company both of commission and omission. The said liability policy insured the said Gillette Company against liability for this specific negligence in the State of Louisiana although the policy contained what is known as a "no action" clause providing that no person injured through negligence of the assured might maintain an action on the policy until and unless judgment was first rendered against the assured or upon written agreement between the injured party, the assured, and the insurance company.

Inasmuch as the opinion of the Court of Appeals held the Louisiana Statutes to be invalid and unconstitutional on the broad ground that they violated "the defendant's constitutional rights" without specifying what constitutional rights were violated, we summarize the Louisiana laws as follows:

Section 1 of Act 541 of 1950 re-enacts Section 655 of Title 22 of the Louisiana revised statutes of 1950, provides that no policy or contract of insurance shall be issued or delivered in the State of Louisiana unless the policy provides that the bankruptcy of the insured shall not release the insurer; that the injured person shall have a right of direct

action against the insurer within the terms and limits of the policy within the State of Louisiana and that this right of direct action shall exist whether or not the policy was written or delivered in Louisiana and whether or not the policy contains provisions forbidding such direct action, providing only the accident or injury occurs within the State of Louisiana and further providing all provisions of the policy not in conflict with the laws of Louisiana shall not be affected. Act 542 of 1950 amends Section 983 of Title 22 of the revised statutes of Louisiana by adding a provision that no certificate of authority to do business in Louisiana shall be issued to a foreign liability insurer until that insurer shall consent to be sued directly as provided in Act 541, whether the policy of insurance sued upon was written in Louisiana or not, and whether or not the policy contains a provision forbidding such direct action, provided that the accident or injury occurs within the State of Louisiana, and further providing such foreign insurer shall deliver to the Secretary of State of Louisiana a consent in writing to such suits as a condition precedent to obtaining a certificate of authority to do business in Louisiana.

Nature of the Case and Rulings of the Court

The case arose on complaint of B. Clinton Watson and his wife, Mrs. Ruth S. Watson, which was filed in the 2d Judicial District Court of the State of Louisiana in and for the Parish of Bienville, Louisiana, on April 5, 1952, seeking judgment for damages against Employers Liability Assurance Corporation, Ltd., as liability insurer of the Gillette Safety Razor Company, because of certain personal injuries inflicted upon Mrs. Watson through the use of a product manufactured and sold by the Gillette Safety Razor Company known as a "Toni Home Permanent". The complaint alleged harmful ingredients in the product, resulting

in injury to Mrs. Watson and further pleaded *res ipsa loquitur*. The defendant removed the case, because of diversity of citizenship, to the United States District Court for the Western District of Louisiana, Shreveport Division, on April 16, 1952. Thereupon the plaintiffs filed an amended complaint in the United States District Court to implead the Gillette Safety Razor Company as an additional defendant. That portion of the case however, that is, the portion involving the Gillette Safety Razor Company as a defendant, is not involved in this appeal.

Defendant Employers Liability Assurance Corporation, Ltd., appeared generally and moved to dismiss for the alleged reasons that Acts 541 and 542 of the Louisiana Statutes for 1950 were and are unconstitutional in that they would violate Section 1, Article 4 and Section 10, Article I and the 14th Amendment of the Constitution of the United States, in that such statutes would:

(a) Impair the obligations of defendant's contract with its assured;

(b) Deny to defendant its right to have full faith and credit given to the Legislative Acts and Jurisprudence of the States of Massachusetts and Illinois, in both of which states a "no action" clause in an insurance policy is valid;

(c) Deprive the defendant of its property and rights without due process of law; and

(d) Deny to defendant the equal protection of the law.

It is and was conceded that the policy was issued by Employers Liability Assurance Corporation, Ltd., to Gillette on or about July 1, 1951; that the policy was written in Massachusetts and delivered in Illinois; that it afforded protection to its assured in all forty-eight states of the union, including Louisiana and covered any accident occurring or liability arising in Louisiana; that Employers Liability As-

surance Corporation, Ltd., had complied with Act 542 of 1950 of the Statutes of Louisiana and have filed with the Secretary of State of Louisiana its consent to be sued directly in Louisiana on any policy issued by it, wherever issued, as to accidents occurring in Louisiana; that Acts 541 and 542 of 1950 went into effect and became the law of Louisiana on July 30, 1950, and that Employers Liability Assurance Corporation, Ltd., had complied therewith and was doing business in Louisiana for many months prior to the issuance of the policy involved in this case and prior to the accident and injury to Mr. and Mrs. Watson.

The District Judge granted Employers Liability Assurance Corporation, Ltd.'s motion and dismissed the complaint, rendering an opinion holding that the Statutes were unconstitutional, as depriving defendant of its property without due process of law for reasons set forth by the District Court in its opinion in the case of *Bish v. Employers Liability Assurance Corporation, Ltd.*, 102 Fed. Supp. 343.

The Court of Appeals affirmed the judgment of District Court in an opinion, copy of which is appended. The decision of the Court of Appeals expressly approved the reasoning and holding of the District Judge without elaborating upon that holding.

Substantial Questions Are Involved

The case was decided solely on the question of the constitutionality *vel non* of the Louisiana Statutes heretofore referred to and solely on the question of whether these Statutes were constitutional enactments of the State of Louisiana. Both the District Court and the Court of Appeals held the Statutes violated the United States Constitution and were therefore null, void and no effect as to any policy of liability insurance either written or delivered outside the State of Louisiana even though the policy afforded

protection of and covered accidents or liability arising in the State of Louisiana. The Supreme Court of the United States has not heretofore decided this question. The State of Louisiana has a sovereign interest in regulating insurance companies doing business within its borders and a great interest to protect parties who might be injured in Louisiana through the negligence of an assured operating or doing business in Louisiana, whenever that assured may have obtained his policy of insurance. The Supreme Court of the United States has never had presented to it or decided a question of this sort as to whether the State, in the exercise of its police powers, may constitutionally enact statutes of the sort here involved.

The conflicts of law question involved in the case is governed by the decision of the Supreme Court in *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477. The Louisiana Court of Appeal, 2d Cir., in *Churchman v. Ingram*, 56 So. 2d 297, 1951 (writ of certiorari was denied by the Supreme Court of Louisiana) construed the statutes involved, and it is the only decision by a Louisiana Court passing upon these statutes. There the statutes involved here were held to be procedural. The Court of Appeals in the present case refused to follow this characterization but instead classified the statutes as substantive and then, upon this holding, determined that the Statutes were unconstitutional.

Even if the Court of Appeals is correct in adopting its own classification of these Statutes, it erred in not following the rationale of *Hoopeston Canning Company v. Cullen*, 318 U. S. 313, 87 L. Ed. 777. The Court of Appeals did not consider in any respect the degree of interest that the State of Louisiana has in the subject matter of the attacked legislation nor would it consider the reasonableness of the legislation. It approached the matter as though it were purely

one of conflicts of law dealing with contracts and brushed aside without comment the proposition that the police powers of the State might be sufficient to overwhelm any constitutional objections made on other grounds.

Cases Sustaining Jurisdiction

Cases believed to sustain the jurisdiction of the Supreme Court of the United States in appeals from a Court of Appeals where that court has held a state statute to be invalid as repugnant to the Constitution of the United States are *McCarol v. Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 60 S. Ct. 504, 84 L. Ed. 683; *New State Ice Company v. Liebmann*, 285 U. S. 262, 52 S. Ct. 371, 76 L. Ed. 747; *People of the State of New York v. Latrobe*, 279 U. S. 421, 49 S. Ct. 377, 73 L. Ed. 776; *Republic Pictures Corporation v. Kappler*, 327 U. S. 757, 66 S. Ct. 523, 90 L. Ed. 991; *Keating v. Public National Bank*, 284 U. S. 587, 52 S. Ct. 137, 76 L. Ed. 507; and *City of Richmond v. Deans*, 281 U. S. 704, 50 S. Ct. 407, 74 L. Ed. 1128.

While the above cases were decided under Section 240 of the Judicial Code (Title 28, U. S. Code, 1946, Paragraph 347) before its recent revision, the present section as revised by the Act of June 25, 1948 (Title 28, U. S. Code, Paragraph 1254 (2)), is substantially identical. See revisers notes to revised section 1254.

Alternate Certiorari Application

Appellants are also applying for certiorari with respect to the same judgment. They believe that the Supreme Court of the United States has jurisdiction over this appeal. If, however, in this they be mistaken, it is requested that writ of certiorari be granted. *Bradford Elec-*

tric Light Company v. Clapper, 284 U. S. 221, 52 S. Ct. 118,
76 L. Ed. 254.

Respectfully submitted,

(Signed) VAL IRION
RICHARD H. SWITZER,
CLEVE BURTON,
Attorneys for Appellants.

APPENDIX
IN THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 14316

B. CLIFTON WATSON, ET UX, *Appellants*,

VERSUS

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED,
 ET AL., *Appellees*.

Appeal from the United States District Court for the
 Western District of Louisiana.

(February 27, 1953.)

Before HUTCHESON, Chief Judge, and STURM and RIVES,
 Circuit Judges.

HUTCHESON, Chief Judge: This is the latest to be decided in a series of five tort actions¹ brought in the Western District of Louisiana against insurers under the Louisiana Direct Action Statutes.²

Originally filed in the state court against appellee, the liability insurer of Gillette Safety Razor Company, under a policy³ containing a "no action" clause valid in Massachusetts, where the policy was written, and in Illinois, where it was delivered, the suit was for damages sustained by plaintiff as a result of using "A New Toni Home Permanent" alleged to be a product manufactured and sold by a department of Gillette Safety Razor Co., the insured.

¹ Bayard v. Traders & General, 99 Fed. Supp. 343, decided 8-18-51; Bish v. Employers, 102 Fed. Supp. 343, decided 1-28-52; Mobley v. K. C. Southern, et al., (unreported) decided 3-22-52; Mayo v. Zurich, 106 Fed. Supp. 580, decided 8-16-52; Watson v. Employers, 107 Fed. Supp. 494, decided 9-15-52.

² Acts 541 and 542 of 1950 of the State of Louisiana.

³ Identical as to insurers and insured and otherwise, except as to dates, with, indeed a renewal of the policy in the Bish case, reported below, 102 Fed. Supp. 344.

The claim was that plaintiff, Mrs. Watson, though she had used the product precisely as directed, had been seriously and permanently injured as a result of so using it, and that defendant, Employers Liability Assurance Corporation, having issued a policy of liability insurance insuring and protecting its insured from liability for negligence, was liable to her for the damages she sued for.

The cause removed by the defendant into the federal court, there followed a welter of pleadings and affidavits, more fully described in the opinion of the district judge.⁴ By and in these, plaintiff undertook, by supplemental and amended complaints filed without leave obtained, to make an additional party, first, Gillette Safety Razor Co., and next, the Gillette Company.

The defendant Employers opposed the filing of these pleadings and the making of these parties; and each of the Gillette companies, on jurisdictional grounds, resisted being brought into the suit.

In addition, Employers filed an extended motion to dismiss the action against it.⁵

On April 11, 1952, all pending motions submitted were

⁴ *Watson v. Employers Liability Assurance Co.*, 107 Fed. Supp. 494.

⁵ Its grounds were: That under the terms of its policy it was not subject to a direct action; that to subject it to such action was to deny full faith and credit to the laws of Massachusetts and Illinois, where the policy was issued and delivered; that it would violate Secs. 1 & 10 of Art. 4 and Sec. 1, of the 14th Amendment to the Constitution of the United States and Sec. 15 of Art. four of the Constitution of La. in that such action would, (a) impair the obligation of the defendant's contract with the Toni Company, (b) deny to defendant its right to have the Courts of Louisiana and the Federal Court sitting in Louisiana give full faith and credit to the Legislative Acts and jurisprudence of the States of Massachusetts and Illinois, (c) deprive the defendant of its property and rights without due process of law, and (d) deny to defendant equal protection of the law; that Act 55 of the Louisiana Legislative Session of 1930, as amended, Sec. 14.45 of Act 195 of the Louisiana Legislative Session of 1948, Sec. 655 of Title 22 of the Louisiana Revised Statutes of 1950, and Acts 541 and 542 of the Louisiana Legislative Session of 1950, under which this proceeding is brought, do not apply under the facts of this case, or if applicable, violate the provisions of the Federal and Louisiana Constitutions referred to in Art. 7 hereof insofar as the said Acts give, or purport to give complainants herein a direct cause of action against

taken under advisement on briefs, and on September 29th, for the reasons given in his opinion, the district judge entered judgment granting the motions.

Adjudging and decreeing that Acts 541 and 542 of the Louisiana Legislative Session of 1950 were unconstitutional, null and void insofar as they attempted to invalidate or otherwise affect the "no action" clause of the policy executed and delivered by a foreign corporation in another state and valid where made, and that the action should in all respects be dismissed, the district judge entered an order dismissing it as to all the defendants.

Appealing from that judgment, the plaintiffs are here seeking its reversal. In support of their contention that the judgment may not stand, they press upon us, first, that the decision dismissing the cause as to Employers was erroneous because it is conceded, as it was in the *Bish* case, that Employers had filed a consent to be sued in a direct action required by Act 42 of 1950, as the condition of doing business in the state.

They press upon us, second, that if the dismissal was not erroneous as to Employers, it was as to the Gillette corporations because they had the right to substitute or bring the Gillettes in as new and additional parties, and that, upon the affidavits of record, they made out a showing as to the Gillette Company that it was doing business in the state and subject to be sued there.

We do not think so. As to the dismissal of the insurer, it is true that, as the extorted price of doing business in the state, it did file the written consent required by Art. 542

defendant under the facts set forth in this motion, as evidenced by the decision of this court in the case of *Bish v. The Employers Liability Assurance Corp., Ltd.*, 102 Fed. Supp. 343; and that the complaint herein fails to state a claim upon which relief can be granted.

This was followed by a prayer: that the motion to dismiss and plea of unconstitutionality be sustained; and that Art. 55 of the Louisiana Legislative Session of 1930 as amended, Sec. 14.45 of Act 195 of the Louisiana Legislative Session of 1948, Sec. 655 of Title 22 of the Louisiana Revised Statutes of 1950, and Acts 541 and 542 of the Louisiana Legislative Session of 1950, each be declared unconstitutional, if applicable to this proceeding, in that they violate those sections of the Federal Constitution listed in Art. 7 of this motion.

of 1950. We find ourselves, however, in complete accord with the views of the district judge that if the statute is construed as extending to and invalidating the "no action" provision of a policy written and delivered, as this one was, outside of the state, the statute represents an attempt to give extra territorial effect to Louisiana laws and to subject to them the doing of business, and the business done, in other states. So construed, we are in no doubt that, as contended by Employers and as found by the district judge, it violates defendant's constitutional rights.

This being so, it is clear that the decisions which settle it that consent to the deprivation of constitutional rights given as the extorted price of doing business in a state cannot prevent the assertion of those rights when they are challenged or sought to be denied, apply in full vigor here.

In complete accord with the reasons summed up by the district judge in his opinion⁴ and with the more ex-

⁴ These, as stated by him are:

"The issues involved in the motion to dismiss insurer (Employers) on the ground of the unconstitutionality of Act 541 of 1950 are the same as in *Bish v. Employers' Liability Assurance Corp., Ltd.*, D. C., 102 F. Supp. 343, which was sustained. Nothing in the arguments has caused this court to change its views, but they have been, in effect, sustained in *Fisher v. Home Indemnity Co.*, 5 Cir., 198 F(2) 218, by the Court of Appeals for this Circuit in its decision handed down on June 30th last. The only difference is that the suit was filed here after the change made in the State law by the Acts 541 and 542 of 1950, LSA-R.S. 22:655, and note, 22:983, subd. E, applying to all policies of insurance whether made or delivered in the State or elsewhere. The latter act compels an insurer, as a condition to doing business in this State, to consent in writing to be sued in a direct action alone upon any policy wherever written, in complete disregard of any "no action" clause. These matters were dealt with fully by this court in the case of *Mayo v. Zurich General Accident & Liability Ins. Co.*, D.C., 106 Fed. Supp. 579. Both statutes were held to be unconstitutional insofar as they dealt with policies written and delivered outside the State of Louisiana, and that the State could not impose the compulsory consent either before or after the insurance company did business here. See also *Bayard v. Traders & Gen. Ins. Co.*, D.C. 99 F. Supp. 343, and *Bish v. Employers' Liability Assurance Corp., Ltd.*, D. C. 102 F. Supp. 343.

Employers will therefore be dismissed from the case for the reasons stated in those decisions."

tended treatment accorded these reasons in the *Bish* and *Mayo* cases, *supra*, we shall not further extend this opinion by elaborating upon them. We shall, therefore, content ourselves with referring with approval to those opinions and the authorities they cite, adding to them others as set out in the appended note.⁷

As to the question whether plaintiffs could or should be allowed to bring into the action, and continue it after dismissal of the insurer as against, either the razor company or the Gillette Company, the district judge was of the opinion, and in effect held, that the dismissal of Employers had effected a dismissal of the whole suit and that it could not be continued on the docket to bring in after removal an additional defendant or defendants not made parties in the state court.

He, therefore, dismissed the action completely and as to all defendants without at all determining or even considering the other questions arising as to the service of process and whether the defendants sought to be substituted are, as claimed, doing business in Louisiana so as to give the court jurisdiction over them.

Appellee Employers points out: that the amended complaints by which plaintiffs sought to make the Gillette companies parties were filed without leave of the court; that no order has ever been issued allowing their filing; that no leave has been entered; that, in fact, the district judge sustained the objections of Employers as to the allowance of these complaints. It insists that the sole question for our decision is whether the trial judge abused his discretion in refusing to allow the amendment. It argues that not only was there no abuse of discretion but that it would have been an abuse to allow their filing.

Insisting that neither Rule 21 nor Rule 25, Federal Rules of Civil Procedure, supports appellants' claim, it points out that Rule 25, providing for the substitution of parties

⁷ *Quaker City Cab Co. v. Penn.*, 277 U. S. 390; *Terral v. Burke Construction Co.*, 257 U. S. 529; *Frost v. R. R. Comm.*, 271 U. S. 583; *Hanover Fire v. Carr*, 272 U. S. 494; *Security National v. Previtt*, 202 U. S. 246; *Power Mfg. Co. v. Saunders*, 274 U. S. 490; *Schwegman Bros. v. Board*, 43 So(2) 248.

in the case of death, incompetency, transfer of interests, etc., cannot possibly apply to this case, for what was attempted here was not the substitution of a party, but, in effect, the institution of a new suit against a new party.

As to Rule 21, which provides, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just", it quotes Moore's Federal Practice, 2nd Ed., Vol. 3, p. 2907:

"It has been held that Rule 21 is not a substitution rule, but contemplates the retention of a party or parties when another party is added or dropped, and therefore that a sole party or defendant cannot be dropped and another added."

and cites cases in support.*

It, therefore, argues that the court was clearly correct in refusing to allow the supplemental and amended complaints filed by appellants and to permit them to continue with the suit by the device of recreating it by bringing into it an entirely new party.

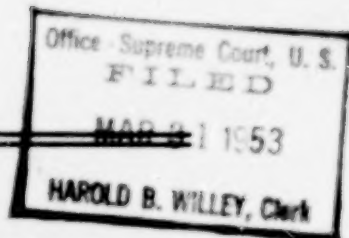
We agree with the appellee that the permitting or refusal of amendments is a matter within the sound discretion of the court and that a rule denying an application to amend will not be disturbed on appeal unless there has been a clear abuse of discretion.

We agree, too, that there was no abuse in this case. Indeed, since the refusal to permit the filing did not in any manner prejudice plaintiffs in their right to sue the defendants separately if they were able to obtain jurisdiction of them, the district judge did not abuse, he used discretion in bringing this action to an end, leaving the controversial matters sought to be injected by the proffered amendments for another action if not another forum.

The judgment of dismissal was right. It is affirmed.

* *United States v. Swink*, 41 Fed. Supp. 98; *Schwartz v. Metropolitan Life Ins. Co.*, 2 FRD 167; *Schwartz v. The Olympic, Inc.*, 74 Fed. Supp. 800; and *Davis v. Cohen*, 268 U. S. 68.

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~698~~ 6

B. CLINTON WATSON, ET UX

versus

EMPLOYERS
LIABILITY ASSURANCE CORP., LTD.

**BRIEF OF APPELLANTS OPPOSING APPELLEE'S
MOTION TO DISMISS OR AFFIRM**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952

No.

B. CLINTON WATSON, ET UX

VERSUS

EMPLOYERS
LIABILITY ASSURANCE CORP., LTD.

**BRIEF OF APPELLANTS OPPOSING APPELLEE'S
MOTION TO DISMISS OR AFFIRM**

MAY IT PLEASE THE COURT:

The appellee moves to dismiss the appeal or affirm the judgment of the court below upon two grounds, the first being that the Court is without jurisdiction and the second being that no substantial federal question is presented.

The motion is without merit. For the convenience of the Court, we shall discuss each ground of the motion separately.

Appellants, in their jurisdictional statement filed pursuant to Rule 12, stated the nature of the case and rulings of the Court. Appellee does not controvert any fact thus stated.

1.

JURISDICTION

Appellee contends that because this appeal does not make The Gillette Company a party appellee, all necessary parties are not before the Court and consequently the Court lacks jurisdiction of the appeal.

The Gillette Company is neither a necessary nor a proper party appellee. A short statement of the facts of the case will make this abundantly clear.

The suit was originally instituted in a court of the State of Louisiana against the appellee as liability insurer of The Gillette Company, a Delaware corporation, as permitted by Louisiana law (*Louisiana Revised Statutes of 1950, Title 22, Section 655*). It was removed by appellee to the United States District Court for the Western District of Louisiana, on diversity grounds.

After removal, appellants sought to make The Gillette Company an additional defendant, alleging joint and several liability unto them, alleging that while The Gillette Company was not authorized to do business in Louisiana, and had not complied with the laws of Louisiana applicable to foreign corporations which desired to do business in Louisiana, the company was actually, in de-

fiance of those laws, doing business in Louisiana. The District Court, in the exercise of its discretion, upon objection by The Gillette Company and appellee, refused to permit the filing of the amended petition seeking to join that company as an additional defendant, making its ruling under the provisions of Rule 21 of the Federal Rules of Civil Procedure.

Appellee filed a motion to dismiss as to it on the ground that the statutes of Louisiana permitting a direct action against it without first obtaining judgment against its assured was unconstitutional as violating various provisions of the United States Constitution.

The District Court dismissed appellants' Claim against The Gillette Company on the ground that it could not be brought into the case as a defendant AFTER removal, and dismissed appellants' claim against appellee upon the ground that the Louisiana statute permitting suit against it was unconstitutional.

The Court of Appeals affirmed upon appellants' appeal on the same grounds as the District Court ruled, namely, that the District Court properly exercised its discretion in refusing to permit The Gillette Company to be made a party defendant AFTER removal, and as to appellee, that the Louisiana statutes in question were unconstitutional.

Appellants have appealed to the Supreme Court under 28 U.S.C. 1254(2), an Act of Congress permitting appeals to the Supreme Court from the Court of Appeals

when that Court has held a State statute unconstitutional. This statute further provides that "the review on appeal shall be restricted to the Federal question presented."

The Gillette Company has not the slightest interest in the Federal question presented. It cannot be affected in the slightest by whatever ruling this Court may make upon the Federal question.

The Gillette Company is blowing both hot and cold. It maintained in the District Court that it was an improper party defendant and the District Court sustained that position. In the Court of Appeals The Gillette Company again insisted that it was an improper party defendant and there, again, its position was maintained. It now takes the position, in this Court, *for the first time*, that it *is* a necessary and proper party defendant. This contradictory position cannot be justified upon any grounds.

The only parties who can possibly be affected by this appeal are the appellants and Employers. The Gillette Company cannot be affected in any way, particularly since the statute declared unconstitutional by the Court below in no way applies to it or affects it. The judgment of the Court below in favor of The Gillette Company is final and the suit as to it is at an end. Whatever may be the final decision of this Court will in no way bear upon The Gillette Company nor touch it in any way.

Appellants had no right to appeal to this Court from a ruling that within the discretion of the trial Court

an amended petition seeking to join an additional defendant should not be allowed. Their appeal, by statute, is limited to the Federal question presented and then only as to the party affected thereby.

The appeal in this case is proper and is supported by these decisions:

Basket v. Hassel, 107 U. S. 602-606, 27 L. Ed. 500;

Amadeo v. Northern Assurance Co., 201 U. S. 194 - 202, 50 L. Ed. 722;

Winters v. United States, 207 U. S. 564-578, 52 L. Ed. 540.

Each of these cases holds that a party to an action who has no legal interest, either in maintaining or reversing the decree, is not a necessary party to the appeal therefrom.

The decisions cited by appellee in support of its contention that The Gillette Company should be an appellee do not support its position here. They lay down the general rule that all parties who will be affected by the decree must be made parties, but it has been shown that The Gillette Company cannot possibly be affected by the decree here and has no interest in the judgment from which appealed.

Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169, 76 L. Ed. 685, cited by appellee, is full authority against its contention. It was there held that the Supreme Court will not undertake to explore the record to ascer-

tain what issues were relied upon in courts below, but will accept the terms of the judgment as entered.

Following this rule, and looking to the judgment entered, all conceivable doubt evaporates and there cannot be any doubt as to the holding of the lower courts.

2.

SUBSTANTIAL FEDERAL QUESTION PRESENTED

On this branch of the case, appellee does not dispute that the Court of Appeals held the statute of Louisiana in question to be unconstitutional and void as offending the Federal Constitution. What appellee is seeking to do in its motion to affirm or dismiss is to argue here the merits of its plea of unconstitutionality.

The sole question on the pending motion is whether appellants were "relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." (28 U.S. Code, 1254(2)).

That appellants relied upon a state statute, Louisiana Revised Statutes of 1950, Title 22, Section 655, is, of course, undenied. But appellee contends that the Court of Appeals merely held this statute inapplicable to contracts of insurance executed and delivered outside the State. Appellee is demonstrably in error.

In the absence of such a statute, appellants could not have sued at all. The best evidence of the fact that

both appellee and the Court of Appeals actually believed the statute applicable is that appellee so contended in its motion to dismiss, filed by it in the District Court. Furthermore, the judgment signed by the District Court in so many words adjudges the statute to be unconstitutional and the Court of Appeals agreed. The statute in its very essence makes itself applicable to this appellee and only if it be unconstitutional would appellee be unaffected thereby.

Were this not correct, then the words of the statute that it applies to all insurance contracts whether written in Louisiana "or not", become meaningless and the words "or not" become surplusage.

It would seem to be inappropriate to argue the constitutionality of the statute, pro and con, at this time. Appellee's position begs the question.

Very serious questions of State rights are involved. The authority of the State to regulate insurance companies operating within its boundaries is in question; the right, or lack of right, of foreign corporations to do business within the State, is involved, and the authority of the State to impose conditions upon that privilege is at stake; the police power of the State to protect individual citizens and legal visitors within its boundaries is sought to be denied.

We had wished not to argue the errors of the Court below, when the sole question before the Court now is one of jurisdiction. But, appellee having done so, we shall cover the matter briefly.

The Supreme Court of Louisiana, the Court of last resort in Louisiana, has held the statute under consideration to be procedural. *Home Insurance Co. v. Highway Insurance Underwriters*, La. , 62 So. 2d 828 (1953). So has the Court of Appeal of Louisiana, 2d Circuit, a Court in the Louisiana system roughly parallel to the U. S. Courts of Appeals. *Churchman v. Ingram*, 56 So. 2d 297. If it be true that the statute is procedural, then no question of substantive due process can possibly be involved. The Court of Appeals in the present case refused to discuss, much less follow, the State Courts on this point. Under the holding of the Supreme Court in *Klaxon v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 85 L. Ed. 1477, it was the duty of the Court of Appeals to follow the State Court in deciding conflict of laws rules.

Even if it be conceded that the Court of Appeals might validly sit as a Court of first instance in deciding whether the questioned law is procedural or substantive, and so sitting, decides in favor of substance, then the Court of Appeals erred in holding the statute to be unconstitutional under settled law respecting the interest of a State in regulating insurance companies doing business within its borders and the right of a State to impose conditions and obligations upon foreign corporations seeking the privilege of doing business therein.

Without, at this time, going into the ramifications of constitutional law as applied to the Louisiana statute involved, it cannot be questioned that the State has a sovereign interest in regulating insurance companies do-

ing business within its territory; it cannot be disputed that the State has a like interest in protecting its citizens and legal visitors in their contact with insurance companies. Louisiana seeks by these laws to make insurance companies doing business in Louisiana answer to their obligations for torts of their assureds committed in Louisiana; this is neither arbitrary nor unreasonable. Louisiana is not alone in seeking to simplify litigation in the respect it has by these statutes. Other States have somewhat similar laws, including California, Alabama, Georgia, Kansas, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee and Wisconsin.

The question is of utmost importance. It relates to the rights of injured parties, and the authority of the State to protect them, when they are injured by the negligence of distant corporations, when those injuries occur in Louisiana, and enables them to have their rights determined at the place of injury, rather than at excessive cost thousands of miles away and in a hostile atmosphere.

The foregoing answers the points in appellee's motion. Other serious and substantial questions involved are set forth in our jurisdictional statement. It would be difficult and inappropriate at this stage, without a printed record or even an unprinted record consecutively paged to which reference can be made, to elaborate our contentions. Further argument and analysis of the record properly await the hearing on the merits. The case is within the appellate jurisdiction of this Court. It presents substantial questions.

We believe it sufficient here to show that the effects of the Louisiana statutes under attack are far less far-reaching than those of New York, California and Washington which were upheld by the Supreme Court in *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 87 L. Ed. 777; *California State Automobile Association Inter-Insurance Bureau v. Maloney*, 341 U. S. 105-111, 95 L. Ed. 788; *State of Washington v. Superior Ct. of Washington*, 289 U. S. 361, 77 L. Ed. 1256 and *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95.

The cases cited by appellee, beginning with *Knop v. Monongahela River Consol. Coal & Coke Co.*, 211 U. S. 485, 53 L. Ed. 294, through *Ferry v. King County*, 141 U. S. 668, 35 L. Ed. 895, listed under paragraph 2 of its motion, subhead "Motion to Dismiss", are manifestly inappropriate. In every one of them, with one exception, there was no holding by the lower Court that the statute involved was unconstitutional. The one exception is *Slaker v. O'Connor*, 278 U. S. 188, 73 L. Ed. 258, wherein there was no final judgment rendered below and the attempted appeal was from an interlocutory decree.

There can be no question as to the holding here. The judgment of the District Court, affirmed in toto, recites that "Acts 541 and 542 of the Louisiana Legislative Session of 1950, insofar as they apply to an insurance company issuing and delivering a policy of public liability insurance outside the State of Louisiana, be and the same are hereby declared to be unconstitutional, null and void." (Emphasis supplied).

If the Louisiana statutes do not apply to appellee, the court below could not have found them to be "unconstitutional, null and void." It would merely have construed the laws to be inapplicable, even though they do apply, in the words of the statutes themselves. An unlawful interference can occur only when a statute does apply but is invalid as repugnant to the federal laws.

The right of appeal accrues when there was properly drawn in question a particular unconstitutional application of the state statute rather than the validity of the statute as a whole. *Danneke-Walker Co. v. Bondurant*, 257 U. S. 282, 66 L. Ed. 239; *Furst v. Brewster*, 282 U. S. 493, 75 L. Ed. 478.

Appellee urges that the questions on which the decision of this case depends are so well settled as not to need further argument. It cites four cases in support of the position. None supports it.

New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. Ed. 1259, holds merely that a contract, *not to be operative in Missouri*, and made by citizens of New Mexico and New York respectively, cannot be validly legislated upon by Missouri. Here it is not disputed that the contract would be, and was, operative in Louisiana.

Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 69 L. Ed. 342, holds only that a subsequent policy of insurance issued by the terms of a primary one, made in Tennessee, is still a Tennessee contract and unaffected by the laws of Texas, where the insured happened to reside when the

subsequent policy came into effect. This case is itself authority for appellants' position that a substantial question of constitutional law is presented here.

Home Insurance Co. v. Dick, 281 U. S. 397, 74 L. Ed. 926, contains the holding, again, that Texas cannot validly legislate respecting contracts made outside its borders and *not operative* within those borders. Here again, the case supports appellants and not appellee, because it was there recognized that a State may validly legislate respecting contracts validly made elsewhere when performance within its territory would violate its laws, and this is especially true if the statutes in question here are procedural, since a State may prescribe the kinds of remedies to be available in its courts and dictate the practice and procedure in pursuing those remedies.

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 78 L. Ed. 1178 holds that provisions in a fidelity bond there involved went to the obligation of the contract. Here there is no question of obligation of contract since the contract was executed long after the passage of the legislation. *Ogden v. Sanders*, 12 Wheat. 213, 6 L. Ed. 606. Again, in the cited case, the contract was not operative within the boundaries of the State seeking to affect it. Furthermore, the holding of the Court was specially limited to the peculiar facts involved as pointed out by the Court at p. 150 of 292 U. S., p. 1182 of 78 L. Ed.

We do not analyze the authorities cited by appellee to the effect that consent to the deprivation of constitution-

al rights given as the extorted price of doing business in a state cannot prevent the assertion of those rights when they are challenged or sought to be denied, because appellant's have never contended otherwise.

Appellants have always contended that appellee has not been deprived of any constitutional rights and that the statutes involved are constitutional. They have never contended, in any court, that the mere fact that appellee, in compliance with Act 542, actually consented to be sued in Louisiana on any of its policies, wherever written, estopped appellee from contesting the constitutionality of the statutes, or seeking to have the Courts declare them to be unconstitutional. Appellants simply say that the requirements of the statute that appellee so consent deprives it of no constitutional right.

Appellee's motion should be denied.

Respectfully submitted,

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CERTIFICATE

This is to certify that copies of this brief have been
served on opposing counsel on this the _____ day of
_____, 1953.

Attorney for Appellants

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX
Appellants-Petitioners

V.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD.**
Appellee-Respondent

On Appeal from, and Certiorari to, the United States
Court of Appeals for the Fifth Circuit

BRIEF OPPOSING MOTION TO DISMISS

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BRIEF OPPOSING MOTION TO DISMISS

MAY IT PLEASE THE COURT:

Employers Liability Assurance Corporation, Ltd.
has moved the Court to recall its order of May 3, 1954,
granting a writ of certiorari in this case.

We submit that the motion is frivolous.

The appellants, in their appeal from the judgment entered by the Court of Appeals, alternatively requested a writ of certiorari strictly in accordance with the holding of this Court in *Bradford Electric Light Company v. Clapper*, 284 U. S. 221, 52 S. Ct. 118, 76 L. Ed. 254.

What appellee argues, boiled down to its essentials, is that the alternate certiorari application should have been on a separate piece of paper. This is a throw back to the middle ages when form was all important and alone attended to, and substance was disregarded.

Appellee to the contrary notwithstanding, appellants never asked this Court to treat the appeal papers as a petition for certiorari but applied for certiorari only in the alternative.

Appellee insists that under U. S. C. Title 28, Sec. 1254(2) the Court may not treat the papers on appeal as a petition for certiorari when applied to a decree of a Court of Appeals and that this may be done only with respect to a decision of the highest court of a state.

As we have already stated, appellants did not ask that the appeal papers be treated as a petition for a writ nor did the Court so treat them. Appellants asked for a writ of certiorari alternatively only and the Court in its ruling of May 3, 1954 postponed to a hearing on the merits the question of jurisdiction on appeal and granted the alternative petition for a writ.

Appellee insists that under the wording of U.S.C. Title 28, Sec. 1254(2), the Court is precluded from entertaining a review on certiorari. This wording is no different in meaning than that contained in Sec. 240 of the Judicial Code as amended by the act of February 13, 1925, which U.S.C. Title 28, Sec. 1254(2) replaced. Nevertheless this Court in *Bradford Electric Light Company v. Clapper*, supra, granted the *alternative* petition for writs.

It is respectfully submitted that appellee's motion be overruled.

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Supreme Court of the United States

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B. CLINTON WATSON, ET UX
Appellants-Petitioners

vs.

EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD.
Appellee-Respondent

BRIEF ON BEHALF OF
APPELLANTS-PETITIONERS

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Appellants-Petitioners

vs.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD.**

Appellee-Respondent

**BRIEF ON BEHALF OF
APPELLANTS-PETITIONERS**

THE CASE BELOW

This case is before the Court on appeal from and on certiorari to the United States Court of Appeals for the Fifth Circuit seeking a reversal of its judgment and decree in the case of *Watson et ux v. Employers Liability Assurance Corp. Ltd.*, reported at 202 F. 2d 407, which decree affirmed that of the United States District Court for the Western District of Louisiana in the case under the same title reported at 107 F. Supp. 494.

Appellee, in Massachusetts, issued a policy of liability insurance to Gillette Company, and delivered that policy in Illinois. The policy contains a provision

prohibiting suit against the insurer by an injured person directly, which provision is valid in Massachusetts and in Illinois. The policy extended coverage in Louisiana which has statutes making such a provision invalid.

Appellee contends that Louisiana Revised Statutes of 1950, Title 22, Sections 655 and 983 (reproduced in full in appendix of this brief) run counter to the United States Constitution by (a) depriving appellee of its property without due process of law, (b) impairing the obligation of appellee's contract with its assured, the Gillette Company, (c) depriving appellee of the equal protection of the laws, or (d) denying to appellee its right to have full faith and credit given to the legislative acts and jurisprudence of the States of Massachusetts and Illinois, within the State of Louisiana.

JURISDICTION OF THE SUPREME COURT

This case has been appealed to this Court under the provisions of 28 U.S.C. 1254(2). It is also before the Court upon writs granted by this Court upon appellants' alternative application for certiorari under the provisions of 28 U.S.C. 1254(1) and the holding of the Supreme Court in *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221, 32 S. Ct. 118, 76 L. Ed. 254.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1 (due process of law);
U. S. Constitution, Art. IV, Section 1 (full faith and

credit); U. S. Constitution, Art. I, Section 10 (impairment of obligations of contracts) and Amendment XIV, Section 1 (equal protection of the laws).

QUESTION PRESENTED FOR REVIEW

Do the Louisiana statutes permitting a direct action against the insurer, within the terms and limits of the policy, by a person, injured in Louisiana by the negligence or fault of the insured, run counter to the provisions of the Federal Constitution just cited, specifically when the policy is written and delivered in States other than Louisiana even though the policy applies and affords coverage in Louisiana?

STATEMENT OF THE CASE

This case is before the Court on both an appeal taken by appellants from a decree of the Court of Appeals for the Fifth Circuit and on writ of certiorari granted by this Court on May 3, 1954.

In accordance with Rule 16 (4) of this Court the question of jurisdiction will first be discussed. In order that this question may be fully presented, a short statement of the history and facts must first be set forth.

On April 5, 1952 appellants, husband and wife, instituted this tort action in a State Court of Louisiana. It was removed by defendant, Employers Liability Assurance Corporation, Ltd., hereinafter called Employers, to the District Court of the United States for the Western District of Louisiana, on diversity grounds.

Employers is a British corporation, engaged in the general insurance business and is and has been for many years authorized to transact an insurance business in the State of Louisiana.

The suit was instituted against Employers as the sole defendant under the provisions of Revised Statutes of 1950 of Louisiana. Title 22, Section 655, as amended by Acts 541 and 542 of the 1950 session of the Louisiana Legislature, which statutes are reproduced in full in the appendix of this brief.

After removal, Employers filed a motion to dismiss on the ground that the statutes of Louisiana, under which the action was brought, were violative of the Federal Constitution. (R. 11-14).

While unimportant here, appellants thereafter sought to join the Gillette Company as a party defendant but this joinder was disallowed by the District Court. Gillette, having been dismissed from the suit, is not involved in the case in this Court.

Employers contended that the statutes of Louisiana above cited are unconstitutional in that they (1) deprive defendant of its property without due process of law; (2) impair the obligation of its contract with its assured, Gillette; (3) deny to defendant the equal protection of the law and (4) deny to defendant its right to have the Courts of Louisiana and the Federal Courts sitting in Louisiana give full faith and credit to the legislative acts

and jurisprudence of the states of Massachusetts and Illinois. (R. 13).

One of the appellants, Mrs. Ruth S. Watson, suffered severe personal injuries as the result of the use of a patented hair waving product, known as a "Toni Home Permanent", a product manufactured by Gillette and sold and distributed throughout the United States, due to harmful ingredients therein. The other appellant, B. Clinton Watson, is the husband of Mrs. Ruth S. Watson, and joins his wife in the suit to recover the medical expenses incurred for the treatment of his wife and for the loss of her earnings while she was disabled as a result of the use of the named product, in conformity with Louisiana law, which vests in the husband the right to recover the expenses of medical treatment of the wife and for her loss of earnings.

Mrs. Watson purchased the wave set at a retail store in the Town of Arcadia, Louisiana, on November 9, 1951. On November 10, 1951 Mrs. Watson applied the product in accordance with the directions thereon and as a result of its use suffered the injuries for which the suit was brought.

In July, 1951, some four months prior to Mrs. Watson's injuries, Employers, in the State of Massachusetts, issued its policy of public liability insurance to Gillette, insuring it against all liability because of any product manufactured by it. (D. Ex.—, R. 11).

This policy was delivered to Gillette in the State of Illinois, where Gillette maintains its principal office. (R. 11).

Under the terms of the policy, Gillette is insured in all 48 states of the Union and Canada.

The policy contains a so-called "no action" clause, which reads as follows:

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

"Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

"Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes."

Admittedly, no suit had been previously brought against Gillette and the amount of Gillette's obligation had not been fixed either by judgment against it after

trial or by written agreement of Gillette, the Watsons and Employers.

Under the Louisiana statutes above cited, the injured party, so long as the accident occurred in Louisiana, has a direct right of action against the insurer, irrespective of the "no action" clause in a policy, and all insurance companies doing business in Louisiana are required by these statutes to consent in writing to be sued directly, irrespective of where the policy may have been issued or delivered, before the company will be given a certificate of authority to do business in Louisiana.

Brief History of Direct Action Statute

Acts 541 and 542 of 1950 amended and reenacted Act 195 of 1948 of the Louisiana statutes (reproduced in full in the appendix of this brief), which in turn amended and reenacted Act 55 of 1930 of the Louisiana statutes (reproduced in full in the appendix of this brief) which likewise in turn amended and reenacted Act 253 of 1918 of the statutes of Louisiana (reproduced in full in the appendix of this brief), the Act of 1918 merely provided that the insolvency of the insured would not release the insurer of its obligation to pay any judgment rendered against the insured covered by the policy. Cf. *Merchants Mutual Auto. Lia. Ins. Co. v. Smart*, 267 U.S. 126, 69 L. Ed. 538, 45 S. Ct. 320.

The Act of 1930 first introduced into the laws of Louisiana the privilege here sought by Mr. and Mrs. Watson to sue the insurance company direct, bypassing

the assured. As will be pointed out later in this brief, the Act of 1930 has been consistently construed by the Louisiana Courts to be procedural and not substantive and as authorizing direct actions against the insurer irrespective of where the policy might have been issued, whether within or without the confines of Louisiana, so long as the accident occurs in Louisiana and so long as the insurer is authorized to do business in Louisiana and service upon it can be obtained.

By the Act of 1948, it was provided that a direct action might be maintained when the policy was issued and delivered in Louisiana. Under that statute, while it was in force, the Court of Appeals for the Fifth Circuit held that the Legislature of Louisiana intended to change the law and that direct actions could not be maintained where the policy had been issued outside the state, so holding in *Belanger v. Great American Indemnity Company*, 188 F. 2d 196.

Evidently the Legislature of Louisiana meant to provide no such thing because at its very next session, it enacted Acts 541 and 542 of 1950.

Statute is remedial, not substantive.

Since the enactment of Act 55 of 1930, the State Courts of Louisiana have, without exception, held that a direct action might be maintained against the insurance company whether the policy was written in Louisiana or not. There is no State Court decision on this question as to Act 195 of 1948 but the State Courts of Louisiana have

consistently held that under the Acts of 1950 such an action is proper and that those statutes are remedial and procedural and in no way substantive. See *Churchman v. Ingram*, 56 So. 2d 297, a decision by the Louisiana Court of Appeal, Second Circuit, a Court in the Louisiana system roughly parallel to the United States Courts of Appeals in the Federal system. Following the decision of the Court of Appeal in the Churchman Case, the Supreme Court of Louisiana, the highest Court in the State, likewise so held in *Home Indemnity Company v. Highway Insurance Underwriters*, 222 La. 540, 62 So. 2d 828.

JURISDICTION ON APPEAL

The District Court held that the statutes were unconstitutional as depriving defendant of its property without due process of law. (R. 35-36). The Court of Appeals affirmed the decree of the district Court and approved the District Court's reasoning. (202 F. 2d 407).

This and another case, entitled "*Bish v. Employers Liability Assurance Corporation*" are companion cases. It so happened that the District Court, in deciding the question of constitutionality, set forth its reasons for so deciding in the Bish Case, reported at 102 F. Supp. 343, and rendered only a memorandum opinion in this case, reported at 107 F. Supp. 494. On the other hand, the Court of Appeals set forth its reasons for affirming the District Judge in this case and rendered only a memorandum opinion in the Bish Case. Hence, it will be necessary in discussing the reasoning of the District Court, which

was affirmed by the Court of Appeals in this case, to refer extensively to the District Court's opinion in the Bish Case.

The judgment of the District Court in this case, which was affirmed by the Court of Appeals, decrees that Acts 541 and 542 of the Louisiana Legislative Session of 1950 "be and the same are hereby declared to be unconstitutional, null and void." (R. 35-36). This judgment, as just stated, was affirmed by the Court of Appeals. Appellants believe that this Court is vested with jurisdiction on appeal under the provisions of 28 U.S.C. 1254 (2), which reads as follows:

"By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. . . . and the review on appeal shall be restricted to the Federal questions presented."

SUMMARY OF ARGUMENT

Jurisdiction on Appeal

The Supreme Court has jurisdiction of this case on appeal because, under U.S.C. Title 28, Sec. 1254(2), an appeal will lie to the Supreme Court from a Court of Appeals when that Court has declared a State statute to be unconstitutional as violative of the Federal Constitution. In the present case, the Court of Appeals, in approving the reasons for judgment of the District Court, held that the statutes of Louisiana under consideration were "unconstitutional, null and void."

Only Proper Party is before the Court.

There were two defendants below. The suit was first instituted against appellee in a State Court and removed by it on diversity grounds. After removal, complainants sought to make Gillette a party defendant by an amended complaint. That complaint was disallowed and Gillette was dismissed from the suit. The dismissal of the amended complaint by the District Court was approved on appeal. Gillette is engaged in the manufacturing business and Employers is engaged in the insurance business. The statutes involved in this appeal apply solely to the insurance business. They affect and apply to Employers alone and not to Gillette. It was on Employers' motion to dismiss, as applicable to it alone, that the District Court held the statutes to be unconstitutional. Therefore, Gillette is not only not a necessary party appellee, but is an improper party appellee, since it will not be and cannot be affected by whatever the final holding of the Court may be. A party who is not interested, as is true of Gillette, in either maintaining or reversing the decree appealed from is not a necessary party to the suit.

*The Obligation of the
Contract is not Impaired.*

The contract between appellee and Gillette was entered into after the passage of the statutes involved. A law can not impair the obligation of a contract contracted after the law went into effect.

*Equal Protection of the
Laws is Afforded.*

Every insurance corporation, domestic or foreign, is placed on the same footing and treated exactly alike. There is no ground for the assertion that unequal treatment is meted out to foreign corporations.

*No Property is taken without
Due Process of Law.*

Appellee wrote its policy to extend coverage in Louisiana. It is permitted to offer and interpose every defense to any law suit which Gillette could offer. No property is taken without a full-dress trial where every defense on the merits of the suit may be made. The statutes involved merely bypass the insured and permit suits directly against the insurer, always the real defendant, a perfectly proper exercise of the police power of the State.

*The Attacked Statutes are
Procedural and not Substantive.*

The Appellate Courts of Louisiana (the Supreme Court of Louisiana, the Court of last resort in Louisiana, and the three intermediate courts, the Courts of Appeal) have consistently held, from the time a "direct action" was first permitted by Louisiana law in 1930, to date, that the statutes in question are purely procedural and remedial and contain nothing substantive. The United States Court of Appeals in the instant case has held directly to the contrary, ruling that the statutes are substantive,

thus not following the holding of this Court in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L. Ed. 1477, 61 S. Ct. 120, and thus making an independent determination for itself instead of accepting Louisiana's rule of conflict of laws.

*Full Faith and Credit
Provision of the Federal
Constitution is not Involved.*

The question involved is whether the law of Louisiana or of another state should be applied to a tort action arising in Louisiana, not whether Louisiana will give full faith and credit to the laws of a sister state. There is no question of full faith and credit at all; the question is solely whether the law of the forum or of another jurisdiction should be applied to local causes of action and local modes of procedure.

ARGUMENT

I

**Mr. and Mrs. Watson are properly before
the Court on Appeal.**

As the quoted Act of Congress (28 U.S.C. 1254(2)) says primarily, an appeal lies to this Court from the Court of Appeals when the Court of Appeals has held a State statute to be unconstitutional. That the Court of Appeals held the Louisiana statutes in question to be unconstitutional, there can be no doubt.

Gillette would be an Improper Party

One of the grounds upon which Employers contends that this Court does not have appellate jurisdiction is that all necessary parties are not before the Court because of the fact that when appellants appealed to this Court from the decision of the Court of Appeals, they did not make Gillette a party-appellee.

Gillette is not only **not** a necessary party-appellee but would be an improper party-appellee. Gillette was sought to be brought into the suit solely on the ground that it was actually doing business in Louisiana and had thus made itself amendable to suit in the Louisiana courts. The amended petition seeking to join Gillette as a defendant in the suit was disallowed and it was dismissed from the case. The District Court then went on to hold that the statutes under which Employers was sued **were unconstitutional and it was only from this judgment or this holding that the appeal was taken.**

A most casual reading of the statutes involved clearly reveals that Gillette is in no way a necessary party herein and is in no way affected. Whether the statutes be constitutional or not can in no way affect Gillette. Under the provisions of 28 U.S.C. 1254 (2) the review on appeal shall be restricted to the Federal questions presented. No Federal question has ever been presented affecting Gillette and Gillette, not being in the insurance business, could in no way be either harmed or aided by the validity or the invalidity of the statutes involved. Only

the question of the constitutionality of these statutes is before the Court and only Mr. and Mrs. Watson on the one hand and Employers on the other hand can in any wise be affected thereby.

It has been held by this Court that a party to an action who has no legal interest in maintaining or reversing the decree appealed from is not a necessary party to the appeal. *Basket v. Hassel*, 107 U.S. 602, 606, 27 L. Ed. 500, 2 S. Ct. 415; *Amadeo v. Northern Assurance Company*, 201 U.S. 194-202, 50 L. Ed. 722, 26 S. Ct. 507; *Winters v. United States*, 207 U.S. 564-578, 52 L. Ed. 340, 28 S. Ct. 207.

State Statutes were held void below.

It having been held in so many words by the District Court that the statutes involved are unconstitutional, null and void as running counter to the Constitution of the United States, and that ruling having been wholeheartedly affirmed by the Court of Appeals, it seems quite clear that this appeal comes within the provisions of 28 U.S.C. 1254(2). It is urged by Employers that the Court below did not hold these statutes to be unconstitutional entirely, but held them to be unconstitutional only if found to apply to appellee and that the holdings below were that if the statutes applied to appellee they were unconstitutional, null and void. This is a laborious exposition of a circular argument.

Since the Courts below necessarily held that the statutes did apply to appellee, for otherwise the plaintiffs

below could not have brought the suit against appellee at all, those Courts necessarily held that the statutes were unconstitutional in so far as appellee is concerned.

It is impossible to follow appellee's argument that the Court of Appeals did not hold the statutes unconstitutional but merely held that they did not apply to appellee, in view of the provisions of Section 655 of Title 22, which reads as follows:

"This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana."

Bluntly, the decisions of the Courts below wiped this provision off the books. They could only have done so by holding that the statute was unconstitutional.

We submit that it makes no difference as to the jurisdiction of this Court which way it was held below because the right of appeal accrues as well when there is a question as to the unconstitutional **application** of a State statute as when the statute as a whole has been declared invalid. *Dahnke-Walker Co. v. Bondurant*, 357 U.S. 282, 66 L. Ed. 239, 42 S. Ct. 106; *Furst v. Brewster*, 282 U.S. 493, 75 L. Ed. 478, 51 S. Ct. 295.

We submit that the appeal was properly taken to this Court and that jurisdiction is vested in this Court.

II

ON THE MERITS

This Court having granted certiorari (R. 52), whether the case is properly before the Court on appeal or not, surely it is before the Court under the writ of certiorari granted to the Watsons.

THE OBLIGATION OF THE CONTRACT
IS NOT IMPAIRED

We shall first take up appellee's contention that the statutes impair the obligation of its contract with its assured.

The statutes attacked became the law of Louisiana on July 31, 1950. The contract was made in 1951. When appellee entered into the contract with Gillette the statutes had been in effect as the law of Louisiana for about a year. At the time appellee made the contract with Gillette, it specifically contracted with regard to the Louisiana laws when it provided in its policy that it would be operative and would protect and insure Gillette throughout the entire United States, of which assuredly Louisiana is a part.

This Court has held time and time again that the obligation of a contract cannot be impaired by the passage of legislation which becomes law before the completion of the contract. *Ogden v. Sanders*, 25 U. S. 213, 12 Wheat 213, 6 L. Ed. 606; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. Ed. 1116, 20 S. Ct. 962; *Munday v. Wis-*

consin Trust Co., 252 U. S. 499-503, 64 L. Ed. 684-689, 40 S. Ct. 365; *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481.

EQUAL PROTECTION OF THE LAWS IS AFFORDED

Nor can it be said that these statutes in any way deprive the appellee of the equal protection of the laws. Appellee is in no different position than is every other insurance company doing business in Louisiana, whether that company be a Louisiana corporation or a foreign corporation authorized to do business in the State. All are treated equally and no unequal treatment is given any of them. They are all afforded the equal protection of the laws.

NO PROPERTY IS TAKEN WITHOUT DUE PROCESS OF LAW

Reverting to the holdings of the District Court in the Bish case, supra, and in *Mayo v. Zurich Gen. A. & L. Ins. Co.*, 106 F. Supp. 579 it will be noted that both were decided by the same District Judge.

In the Mayo Case, the District Judge, in so many words, held that the effect of these statutes is to deprive the insurer of its property without due process of law. Again in the Bish Case, the District Judge was of the same opinion still. It appears that the rulings of the District Court were primarily influenced by its conclusion that these statutes are unwise legislation and sometimes might place an insurance company in a difficult position and under a great handicap, all of which is exemplified by the illustration contained in the opinion of the District Court in the Bish Case.

Whether this type of legislation is wise or unwise is not within the province of the Court to decide. That is something that addresses itself to the legislative branch of the government. Wise or unwise the legislation stands unless it runs counter to some provision of the constitution, and the fact that a Judge might think this legislation to be bad law from the viewpoint of the public welfare has nothing to do with its constitutionality.

It is difficult indeed to pinpoint in what manner an insurance company is deprived of its property without due process of law when the statutes specifically provide that any suit brought thereunder is limited to the "terms and limits of the policy" and when the statutes further provide that any action brought under them shall be subject to all of the lawful conditions of the policy and the defenses which could be urged by the insurer to a direct action brought by the insured. This means that whatever defenses to the action are open to the assured are open to the insurer. If the insured was not negligent, that defense is open to the insurer. If the claimant was contributorily negligent, that defense is open to the insurer. Every defense that the assured himself could assert against the claim of a plaintiff is open to the insurance company. *Sheeren v. Gulf Ins. Co.*, 174 So. 380 (La. App.). No property is taken from it unless it be by verdict and judgment on the facts after a full, searching trial where both sides introduce their evidence and assert their legal contentions, which are resolved by the Court or jury as the case may be.

These statutes simply eliminate the method of requiring any injured plaintiff to first sue the tort feaser himself and after obtaining judgment against him and, being unable to collect it, then to institute a second suit on the judgment against the insurer. All of this round-about procedure is cut away and an injured party is permitted to go directly to the heart of the matter and recover a judgment against the real defendant and the real party which will pay such judgment. Since the policies of insurance provide that the insurance company will defend the law suit it will be seen that no due process is denied the insurer and no property is taken without due process of law.

Act 541 of 1950 is that statute which confers the right of direct action. It is by no means unique. Other states have somewhat similar laws, including Alabama, Arkansas, California, Georgia, Idaho, Iowa, Kansas, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Texas, Washington and Wisconsin.* It is, of course, true

(*) Alabama Code, 1940, Title 28, Paragraph 11, 12; Arkansas Acts 1927, Page 667, Paragraph 1 and 2; California Insurance Code, Paragraph 11, 580 (St. 1935, p. 716); Georgia Code, 1933, Paragraph 23-1502, 32-919, 68-501, et seq.; Idaho Code 1932, Paragraph 28-102; Iowa Code 1939, Paragraph 5100.26; Kansas Rev. St. Supp. 1933, 66-1128, *Hudson v. Kitchum*, 155 Kan. 332, 133 Pac. 2d 171; Massachusetts G.L. (Ter. Ed) c. 175, Paragraph 113, c. 214, Paragraph 3, Cl. 10; New Jersey, N.J.S.A. 39:6-1, et seq; New York Insurance Law, Paragraph 167; Ohio Gen. Code, Paragraph 9510-4; Rhode Island General Laws 1923, c. 258, Paragraph 7; Texas Vernon's Ann. Civ. St., Article 911 A; Washington Rev. Comp. Stat. Paragraph 6391; Wisconsin Stat. 1943, Paragraph 85.93.

that the mentioned statutes of the other states are not precisely like that of Louisiana, with the possible exception of Wisconsin's, but under all of them a direct action against the insurer is afforded in appropriate cases.

Written Consent Unimportant

The second of the two statutes challenged, Act 542 of 1950, (La. Rev. Statutes 22:983) provides that no insurance company shall be issued a certificate of authority to do business in Louisiana until as a condition precedent it shall consent to be sued by a person who may be injured in Louisiana, directly upon its policy whether or not such policy contains provisions forbidding such direct action and whether or not the policy was written or delivered in the State of Louisiana.

It is contended by appellee that this statute deprives it of property without due process of law because it forces it to consent in advance to be sued as the price of transacting its business in Louisiana. In support of this contention it urges that if it does not so consent it will be deprived of its right to do business in Louisiana and its right to the premiums on the policies it would and could write in the State of Louisiana.

In the first place it is submitted that whether the particular statute is constitutional or not is of no particular importance because under Act No. 541 the insurance company may be sued directly on an out of state policy so long as it does business in Louisiana and Mr. and Mrs. Watson are not dependent upon Act 542 for the maintenance of their suit.

By Act 541 of 1950 the Legislature provided that an insurance company could be sued directly, no matter where the policy was issued and delivered, if the accident occurred in Louisiana. By Act 542 of 1950 the Legislature instructed the Secretary of State not to admit a foreign insurance company to the state until it had agreed to abide by the mentioned provision in Act 541. Obviously, if Act 541 is constitutional, i.e., if the Legislature had the power to say: "this right of action shall exist whether the policy of insurance sued upon was written and delivered in the State of Louisiana or not" then it had the additional power to require foreign insurance companies to agree to put themselves on the same basis as Louisiana companies. Conversely, it is also obvious that if the Legislature lacked the power to enact the quoted words, then it lacked the power to force a foreign insurance company to sign the consent agreement.

Since Act 542 will either stand or fall with Act 541 it would serve no useful purpose to discuss it further.

State May Impose Conditions for Admission

Reiterating our belief that Employers has the right to test the constitutionality of these statutes, we point out that it has been the law for many years that there is no constitutional right given to a corporation to transact business in a state other than the state of its creation and that other states may impose upon the foreign corporation such regulations and conditions as it sees fit before permitting the corporation to do business within its boundaries

so long as no constitutional right is denied it. 23 Am. Jur., Page 214, Sec. 245, 246 and the host of cases there cited.

Furthermore, it has long been the law that a state may exclude foreign corporations even on conditions which would impair their contracts in so far as those contracts contemplated performance within the admitting state. 23 Am Jur., Sec. 248, Page 217. Here the contract between appellee and its insured contemplated performance in Louisiana with respect to all claims arising against Gillette in Louisiana. This proposition of law is so well settled that it would seem to be idle to labor the question further. These statutes are far less far-reaching than were those of the states of New York, California and Washington which were sustained by this Court in the cases of *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 87 L. Ed. 777, 63 S. Ct. 602; *California State Automobile Association Inter-Insurance Bureau v. Maloney*, 341 U.S. 105-111, 95 L. Ed. 788, 71 S. Ct. 601; *State of Washington v. S. Ct. of Washington*, 289 U.S. 361, 77 L. Ed. 1256, 53 S. Ct. 624; and *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 1541.

The right of a state to regulate insurance companies doing business within its boundaries has been sustained many times by this Court which has held that the state has broad regulatory powers over the insurance business. See: *Osborn v. Ozlin*, 310 US 53, 84 L. ed 1074, 60 S. Ct. 758; *German Alliance Ins. Co. v. Lewis*, 233 US 389, 58 L ed 1011, 34 S Ct 612, LRA 1915C 1189; *Aetna Ins. Co. v. Hyde*, 275 US 440, 72 L ed 357, 48 S Ct 174; *O'Gorman & Young v. Hartford Fire Ins. Co.* 282 US

251, 75 L ed 324, 51 S Ct 130, 72 ALR 1163; *National Union Fire Ins. Co. v. Wanberg*, 260 US 71, 67 L ed 136, 43 S Ct 32; *La Tourette v. McMaster*, 248 US 465, 63 L ed 362, 39 S Ct 160; *Hardware Dealers' Mut. F. Ins. Co. v. Glidden Co.* 284 US 151, 76 L ed 214, 52 S Ct 62; *Neblett v. Carpenter*, 305 US 297, 83 L ed 182, 59 S Ct 170; *Orient Ins. Co. v. Daggs*, 172 US 557, 43 L ed 552, 19 S Ct 281; *Whitfield v. Aetna Life Ins. Co.*, 205 US 489, 51 L ed 895, 27 S Ct 578; *Hocpeston Canning Co. v. Cullen*, 318 US 313, 87 L ed 777, 63 S Ct 602, 145 ALR 1113.

As this Court said in *California Automobile Association v. Maloney*, 341 U. S. 105-111, 95 L ed 788, 71 S Ct. 601, the police power of the state covers all public needs. There the Court said:

"What was there said about the police power— that it 'extends to all the great public needs' and may be utilized in aid of what the legislative judgment deems necessary to the public welfare (p. 111)— is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation'. See *Osborn v. Ozlin* 310 US 53, 65, 66, 84 L ed 1074, 1079, 1080, 60 S Ct 758. Here, as in the banking field, the power of the state is broad enough to take over the whole business, leaving no part for private enterprise. *Mountain Timber Co. v. Washington*, 243 US 219, 61 L ed 685, 37 S. Ct. 260, Ann Cas 1917D 642, 13 NCCA 927; *Osborn v. Ozlin*, supra (310 US p 66, 84 L ed 1079, 60 S Ct 758)."

THE STATUTES ATTACKED ARE PROCEDURAL AND CONTAIN NOTHING SUBSTANTIVE

If the Louisiana Courts are correct in their holdings that these statutes are procedural and not substantive, then the whole question of constitutional infringement goes by the boards.

Beginning with *Rossville Commercial Alcohol Corp. v. Dennis Sheen Transfer Co.*, 138 So. 188 to and including *Home Insurance Co. v. Highway Insurance Underwriters*, 222 La. 540, 62 So. 2d 828, the Louisiana Courts, including the three Courts of Appeal and the Supreme Court, have held without exception that Act 55 of 1930 and its progeny are procedural and contain nothing substantive.

See *Robbins v. Short*, (La. App.) 165 So. 512, 514; *Ruiz v. Clancy*, 182 La. 935, 162 So. 734; *Stephenson v. List Laundry & Dry Cleaners*, 182 La. 383, 162 So. 19; *Parker v. Home Indemnity Co. of N.Y.* (La. App.) 41 So. 2d 783; *Rossville Commercial Alcohol Co. v. Dennis Sheen Transfer Co.*, (La. App.) 18 La. App. 725, 138 So. 183; *Gager v. Teche Transfer Co.*, (La. App.) 143 So. 62; *Graham v. American Employers Insurance Co.*, (La. App.) 171 So. 471; *Bougon v. Volunteers of America, et al*, (La. App.) 151 So. 797; *Reeves v. Globe Indemnity Company*, 182 La. 905, 162 So. 724; *Tuck v. Harmon*, (La. App.) 151 So. 803; and *Burke v. Mass. Bonding & Insurance Co.*, 209 La. 495, 24 So. 2d 875.

It is apparent that the holding of the Court of Appeals in this case is in direct conflict with the holdings of the Louisiana Courts. The Court of Appeals has also

held contrary to the settled rule that a Federal Court, in deciding diversity cases, must use the state's conflicts of laws rule in passing upon the question. This Court, in *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 US 487, 85 L ed 1477, 61 S Ct 1020, said:

"The principal question in this case is whether in diversity cases the federal courts must follow conflict of law rules prevailing in the states in which they sit. We left this open in *Ruhlin v. New York L. Ins. Co.*, 304 US 202, 208, note 2, 82 L ed 1290, 1293, 58 S. Ct 860. The frequent recurrence of the problem, as well as the conflict of approach to the problem between the Third Circuit's opinion here and that of the First Circuit in *Sampson v. Channel*, 110 F (2d) 754, 759-762, 128 ALR 394, led us to grant certiorari." (P. 1479)

Further in the same case, the Court had this to say:

"We are of the opinion that the prohibition declared in *Erie R. Co. v. Tompkins*, 304 US 64, 82 L. ed 1188, 58 S Ct 817, 114 ALR 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the Federal Court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie R. Co. v. Tompkins*, supra, at 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based. Whatever lack of uniformity this may

produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County v. M. E. White Co.*, 296 US 268, 272, 80 L ed 220, 225, 56 S Ct 229. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston Co.* 290 US 163, 78 L ed 243, 54 S Ct 134. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." (P. 1480)

Statute is valid exercise of police power.

In the final analysis the question boils down to whether it lies within the power of the state in the exercise of its police power to constitutionally enact legislation of the kind here involved. Most assuredly the state has an overwhelming interest in protecting the rights of persons within its boundaries and affording to them a simple, practical method of obtaining compensation at the place of injury. The present case is an excellent example of the wisdom of leaving to the states their rights through their law-making bodies to confer upon an injured person the privilege of obtaining redress where he was injured. Admittedly, Gillette's manufactured products were shipped into Louisiana and sold to the public in that state.

Admittedly, if a member of the general public is injured in Louisiana through the use of a product manufactured by Gillette and sold in Louisiana, that person has a cause of action for the injuries sustained. It is difficult to conceive of a more reasonable or a more valid exercise of the police powers of the state. These statutes do no more than to require the ultimate judgment debtor to answer for the tort at the place the tort was committed, where the witnesses are available and in the Courts of either the state in which the tort was committed or the proper Federal Court sitting therein. There has been cited by appellee no good reason for striking down this legislation, no case of this or any other Court has been cited holding that these statutes are anything but procedural and no case holding that there is an impairment of the obligation of a contract or the denial of due process of law.

When it is realized that the statutes under attack merely place the foreign insurance company on the same basis with insurance companies organized in Louisiana the fallacy of appellee's argument is apparent.

The closest appellee has come to any decisions remotely touching on this question are four cases of this Court, namely, *New York Life Insurance Company v. Head*, 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879; *Aetna Life Insurance Co. v. Dunken*, 266 U.S. 389, 69 L. Ed. 342, 45 S. Ct. 129; *Home Insurance Company v. Dick*, 281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338; and *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178, 54 S. Ct. 634. All of these cases hold that

a state may not validly legislate upon contracts confectioned and existing outside its boundaries and **not operative** within its boundaries. If appellee's policy here afforded no coverage within the State of Louisiana and did not insure Gillette for its torts committed in Louisiana, these cases would certainly be pertinent. But the dividing line is that in this case the contract was expressly made operative in Louisiana, did apply in Louisiana and covered the liability of Gillette incurred in Louisiana. Therein lies the difference and removes the cited cases from any application to the case at bar.

FULL FAITH AND CREDIT IS NOT INVOLVED

Although Employers assigned as one of the reasons why the statutes under consideration are unconstitutional its contention that they deny to it its right to have full faith and credit given to the legislative acts and jurisprudence of the States of Massachusetts and Illinois within the State of Louisiana, in reality, this principle has no place in this case and this contention has never been seriously urged by Employers in the Courts below. It was never mentioned in any of its briefs.

Nevertheless, no full faith is denied. The question is not whether the law of Massachusetts or Illinois must be recognized and applied in the present case but whether the Louisiana law is valid and should be applied. It is well settled that a state is not compelled to enforce the terms of an insurance policy normally subject to the law of another state where the enforcement will conflict with

the public policy of the state of the forum. *Hoopston Canning Co. v. Cullen*, 218 U. S. 313, 87 L. Ed. 777, 63 S. Ct. 602; *Griffin v. McCoach*, 313 U. S. 498, 85 L. Ed. 1481, 61 S. Ct. 1023; *Alaska Packers Asso. v. Industrial Acci. Comm.*, 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518.

CONCLUSION

We respectfully submit that there is no constitutional infringement in the statutes in question and that the Courts below erred in so concluding.

We submit that the decrees of the Courts below should be reversed, the statutes held to be constitutional as in no way conflicting with any provisions of the Constitution of the United States, and held to be a valid exercise of the police powers of the state and that the case should be remanded to the District Court for further proceeding.

Respectfully submitted,

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APPENDIX

ACT 253 OF 1918 OF STATUTES OF STATE
OF LOUISIANA

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company.

Section 2. Be it further enacted, etc., That the issuance of any policy against liability which does not contain the clause above specified shall be a misdemeanor, punishable by a fine of not less than fifty dollars (\$50.00) and not more than five hundred dollars (\$500.00) or imprisonment of not less than one month and not more than twelve months, or both at the discretion of the Judge.

Section 3. Be it further enacted, etc., That this Act shall take effect and be in force from and after October 1, 1918.

Section 4. Be if further enacted, etc., That all laws or parts of laws in conflict herewith be and the same are hereby repealed."

ACT 55 OF 1939 OF STATUTES OF LOUISIANA

Section 1. Be it enacted by the Legislature of Louisiana,
That the title of Act 253 of 1918 be amended
and re-enacted so as to read as follows:

An Act providing that no policy against liability shall be issued unless it contains a proviso that the insolvency or bankruptcy of the assured shall not release the company from liability for injury sustained or loss occasioned during the life of the policy; prescribing what shall constitute prima facie evidence of insolvency; providing for direct action within the terms and limits of the policy by the injured person, his or her heirs, and the place where such action may be brought; and providing a penalty for the violation of this act.

Section 2. That Section 1 of Act 253 of 1918 be amended and reenacted so as to read as follows:

Section 1. That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and any judgment which may be rendered against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may thereafter be maintained within the terms and limits of

the policy by the injured person or his or her heirs against the insurer company. Provided further that the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly or in solido.

Provided that nothing contained in this act shall be construed to affect the provisions of the policy contract if the same are not in violation of the laws of this State.

It being the intent of this act that any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured; provided the term and condition of such policy contract are not in violation of the laws of this State."

SECTION 14.45 OF ACT 195 OF 1948 OF STATE OF LOUISIANA (THE LOUISIANA INSURANCE CODE)

"No policy or contract of liability insurance shall be issued or delivered in this State, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned

during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. Nothing contained in this section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

**TITLE 22: SECTION 655, LOUISIANA REVISED
STATUTES OF 1950, AS AMENDED BY ACT 541
OF 1950.**

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of

the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly or in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the

insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

TITLE 22: SECTION 983, LOUISIANA REVISED STATUTES OF 1950, AS AMENDED BY ACT 542 OF 1950.

A. After the requirements of R.S. 22:982 have been completed and before a certificate of authority is issued by the Secretary of State, a foreign or alien insurer shall satisfy the Secretary of State that:

- (1) Its name is not the same as, or deceptively similar to the name of any other insurer already authorized to transact business in this state;
- (2) It is possessed of at least the minimum capital and surplus requirements for similar domestic insurers authorized to transact like kinds of insurance which is authorized to transact in the state of its domicile or entry, including, if a mutual or reciprocal insurer, writing non-assessable policies, the surplus requirement for a similar domestic mutual insurer to issue non-assessable policies;
- (3) Its funds are invested in accordance with the laws of its domicile.

B. Before issuance of the certificate of authority to a foreign insurer, such insurer shall make a deposit as required by Part XXII and file a certificate from an of-

ficial of another state showing that a deposit has there been made, in the same amount that is required of a similar domestic insurer transacting like kinds of insurance.

C. Before issuance of the certificate of authority to an alien insurer, such insurer shall make a deposit as required by Part XXII and must maintain within the United States assets in amount no less than its outstanding liabilities arising out of its insurance transactions in the United States, and which assets shall be in addition to the larger of the following sums:

(1) The largest amount of deposit required by this Code to be made in this state by any type of domestic insurer transacting like kinds of insurance; or

(2) Two hundred thousand dollars.

The trust deposit shall be for the security of all policyholders or policyholders and obligees of the insurer in the United States. It shall not be subject to diminution below the amount currently determined in accordance with this Sub-section so long as the insurer has outstanding any liabilities arising out of its business transacted in the United States.

The trust deposit shall be maintained with public depositories or trust institutions within the United States approved by the Secretary of State.

D. Before issuing a certificate of authority to a foreign or alien insurer, the Secretary of State may cause an examination to be made of its condition and affairs.

E. No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this Title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. The said foreign or alien insurer shall deliver to the Secretary of State as a condition precedent to the issuance of such authority, an instrument evidencing such consent."

OCT 4 1954

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX
Appellants-Petitioners

VS.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION,**
Appellee-Respondent

**REPLY BRIEF ON BEHALF OF
APPELLANTS-PETITIONERS**

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Appellants-Petitioners

VS.

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Appellee-Respondent

**REPLY BRIEF ON BEHALF OF
APPELLANTS-PETITIONERS**

STATEMENT OF THE CASE

At pages 3 to 7, both inclusive, of their original brief filed with this Court, appellants- petitioners (hereinafter referred to as "Watsons" for brevity) detailed their statement of the case as they understand it.

In the brief of appellee-respondent (hereinafter referred to as "Employers" for brevity), it contends that the Watsons have "omitted or misstated certain essential facts" in their statement of the case as set forth in their original brief.

In order to show that the Watsons have neither omitted nor misstated any facts, and in order to point out both errors in fact and in law asserted in Employers' brief, both in its statement of the case and elsewhere in its brief, as will be detailed in other portions of this brief, this reply brief is respectfully submitted.

Our reply to Employers' brief will as far as possible, follow the sub-heads employed by Employers.

On page 7 of its brief Employers quotes Clause IV of the Insuring Agreements of the policy (R. 56) declaring that the policy applies to all accidents "occurring within the United States of America, its territories or possessions, Canada or Newfoundland." Employers then goes on to say in the next paragraph that Gillette and it specifically contracted with reference to Massachusetts law and that the quoted provision of the policy indicates that no insurance was extended to accidents occurring in Louisiana.

Since the policy itself provides that it does cover accidents in Louisiana and since the policy itself provides that all liability of Gillette in Louisiana is covered, it is impossible to square Employers' contention either that the policy did not cover in Louisiana or that it and Gillette contracted with reference to Massachusetts law.

Actually, and as a matter of fact, the parties to the contract of insurance contracted with respect to the laws of all 48 states of the Union, the laws of Canada and the laws of Newfoundland, since the policy was made operative in all of those places.

History of Louisiana Direct Action Statute

Under that portion of its brief directed to the history of the Louisiana direct action statute it is urged on page 11 of Employers' brief that the courts have rendered conflicting opinions as to the extraterritorial effect of the statutes under consideration and their predecessors, particularly Act 55 of 1930 of the Louisiana Statutes. In support of this contention the Louisiana case of *Lowery v. Zorn*, 157 So. 826 is cited. This case was a decision by the Louisiana Court of Appeal, an intermediate court, and was specifically overruled by the Supreme Court of Louisiana in *Stephenson v. List Laundry & Dry Cleaners*, 182 La. 383, 162 So. 19, decided in 1935. The Stephenson case has been consistently followed thereafter by the Courts of Appeal, the first decision of those courts thereafter being *Robbins v. Short*, 165 So. 512 where it was recognized at pages 514-515 that the holding in *Lowery v. Zorn* on this point was overruled by the Supreme Court.

The only other decision cited by Employers in this connection is *Wheat v. White*, 38 F. Supp. 796, which is a decision by a Federal District Court and as such has no value as precedent and establishes no authority for the interpretation of the questioned Louisiana statutes. Once the questioned statutes were established as procedural by the Louisiana Appellate Courts, the Federal Courts in that state concurred in this characterization until the present case and its companion ones arose subsequent to the passage of the 1950 statutes. See *Bouis v. Aetna Cas. & Surety Co.*, 91 F. Supp. 954, and cases therein cited. In the Bouis case it is said:

"It seems to be settled that these statutes do deal with procedure alone. The writer in 1932, in *Hudson v. Georgia Casualty Co. et al*, 57 F. 2d 757, followed the decisions of the state courts to that effect, and to some extent analyzed and rejected the claims of unconstitutionality under the Federal Constitution."

Likewise, under this heading, beginning at the bottom of page 12 of its brief and continuing on page 13 thereof, Employers argues that Louisiana has not and never has had any power to regulate insurance contracts entered into outside its jurisdiction even if such contracts are entered into by Louisiana citizens or cover risks within Louisiana.

This argument is at war with the decision of this Court in *Hoopeston Canning Company v. Cullen*, 318 U.S. 313, 87 L. Ed. 777, 63 S. Ct. 602. In that case the policies of insurance involved were not written in the State of New York, no payments of losses were made in New York, but the insured risks were in New York. This Court held that the statutes of New York, there under attack, regulating the foreign insurance corporation, were perfectly valid and the State of New York was well within its rights in regulating the contracts as applying to risks in New York because of the substantial contact with New York inherent in the insurance policies themselves.

Employers argues further that since Congress enacted the McCarran Act, 15 U.S.C. 1011-1015, the states could regulate insurance companies only to the extent that they could regulate them prior to the passage of that

Act in 1945 and from this premise contends that since the McCarran Act was enacted in 1945 and the subsequent statutes of Louisiana, under attack here, were enacted in 1950, necessarily the statutes cannot stand.

In the first place the State of Louisiana had the power to enact these statutes long before the McCarran Act was passed and in the second place it had *actually* exercised the power long before the McCarran Act was passed. In 1930, by the passage of Act 55 of that year, Louisiana enacted its first direct action statute. As interpreted by its Courts, specifically in *Robbins v. Short*, 165 So. 512, decided in 1936, the Louisiana Court held that the statute applied to policies written and delivered outside of Louisiana and extending coverage in Louisiana, as to accidents occurring in Louisiana. *Robbins v. Short* was decided in 1936, some 9 years before the passage of the McCarran Act. So it is seen that under the Act of 1930, as interpreted by the Louisiana Courts, Louisiana had actually exercised the power here asserted at least 9 years before the McCarran Act was passed. The Acts of 1950 simply placed in statutory form that interpretation of the 1930 Act, placed thereon by the courts.

At page 14 of its brief Employers asserts that "the courts" promptly held, upon the adoption of the Louisiana Insurance Code (Act 95 of 1948), that the Louisiana legislature intended for the direct action provision of the statute to be applicable only to policies issued and delivered in Louisiana. "The courts" did no such thing. The only court which so held was the Court of Appeals for

the Fifth Circuit in *Belanger v. Great American Indemnity Company*, 188 F. 2d 196, the very court whose ruling is involved in this case, at this time, before this Court. The Louisiana Courts *never* so held.

Validity of Direct Action Clause

At page 15 of its brief Employers urges that the only obligation assumed by it in the policy involved in this case was the obligation "to indemnify its insured, the Gillette Company, against losses arising by its own negligence." Employers further urges that since the contract was executed in Massachusetts, the Massachusetts law entered into it.

Employers is primarily in error in asserting that the policy involved here is an indemnity policy. It is not. It is a liability policy. To make this abundantly clear, we quote from the policy (R. 56) the Insuring Agreements, thus:

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom sustained by any person and caused by accident."

.

"Defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."

Of course, secondly, Employers is correct that the law of Massachusetts entered into the contract but only in so far as the policy covered and afforded protection in Massachusetts. The law of Louisiana likewise entered into it to the extent that the policy covered and afforded protection to Gillette as to accidents occurring in Louisiana. The same thing is true of the laws of every other state of the union and the law of each of them entered into it to the extent that the policy covered accidents occurring within the boundaries of those states.

In the same paragraph in which the above arguments are advanced by Employers, beginning on page 15 of its brief and continuing on page 16 thereof, the flat assertion is made that the policy of insurance was issued for the protection of the insured and it was not designed for the protection of strangers. To the extent that the policy afforded coverage in Louisiana and covered accidents occurring there, just the opposite is true. It cannot be seriously argued that Louisiana was excluded from coverage of this policy when the policy in so many words provides that it shall apply to accidents occurring anywhere in the United States, nor can it be seriously urged that the parties to the contract contemplated no coverage in Louisiana, since Louisiana accidents were not excluded.

Inasmuch as Gillette and Employers both contracted with the view of liability arising anywhere in the United States, they contracted with the view of coverage in each state and the laws and public policies of the various states in which the policy would be effective. When this

particular policy was issued in 1951 both Employers and Gillette were well aware of the public policies of the various states in which the policy would be effective. In 1942 the Supreme Court of Louisiana in *Davies v. Consolidated Underwriters*, 199 La. 459, 6 So. 2d 351 at page 357 of 6 So. 2d held:

"The statute expresses the public policy of this State that an insurance policy against liability is not issued primarily for the protection of the insured but for the protection of the public."

At page 16 of its brief Employers argues that in view of the fact that the Watsons had not, as required by the no-action clause of the policy, obtained a judgment against Gillette, Gillette itself could not maintain a suit on the contract in Louisiana. That statement is likewise erroneous.

Assuming that the Wastons had instituted this suit solely against Gillette and Gillette had, in accordance with the terms of the policy notified Employers of the institution of the suit and called upon Employers to defend it as its policy provides Employers must do, as will be seen from the quotation from the policy earlier in this brief, and Employers had refused to defend the suit or had otherwise refused to comply with its policy, Gillette could, in the very same suit, sue Employers on the policy. This very contingency is provided for under Louisiana law. Article 378 of the Louisiana Code of Practice provides:

"The obligation which one contracts to defend another in some action which may be instituted against him is termed warranty. The one who has contracted this obligation is called the warrantor."

Article 379 of the Louisiana Code of Practice provides:

"Personal warranty is that which takes place in personal actions; it arises from the obligations which one has contracted to pay the whole or a part of a debt due by another to a third person."

Under these provisions of the Louisiana law, in such a situation Gillette could call Employers in warranty and require Employers to defend the suit and at the same time obtain a judgment against Employers for such amount as the Watsons might obtain against Gillette, together with such damages and attorneys' fees as Gillette may have suffered by the refusal of Employers to defend the suit. *Shehee-Ford Wagon & Harness Co. v. Continental Casualty Company*, 170 So. 249.

At page 16 of its brief Employers states that the Watsons assert on pages 3 and 13 of their original brief "that this is not an action on the contract but is actually a *tort action*". Inferentially Employers thereby asserts that this suit is not a *tort action* but is an action *on the contract*. The inference thus sought to be made by Employers is contrary to the established law of Louisiana that this action is a *tort action* and is not an action on the contract. In *Reeves v. Globe Indemnity Company*, 182 La. 905, 162 So. 724, the Supreme Court held squarely

that a suit for personal injuries directly against the insurer of the tortfeasor, as permitted by the statutes under consideration and as was permitted by Act 55 of 1930, then in force, is one *ex delicto* and is not a suit on the contract.

Public Policy of Other States

Beginning on page 17 of its brief and continuing through page 20 Employers asserts that in 44 states of the Union no suits are permitted directly against the insurer; that in those states the no-action clause of a liability policy is legal, and in those states it is error to even mention that the tortfeasor is protected by insurance. This assertion is bolstered by quotations from cases arising in some of those states and by reference to a statute of Michigan prohibiting the joinder of the insurer as a party defendant.

We submit that this contention is wholly irrelevant and has no bearing whatever on the questions involved in this case. It is of no moment whatever what the public policy of Michigan might be or the public policy of New Mexico might be but the question here is what is the public policy of Louisiana. We have heretofore shown in the Watsons' original brief and in this brief, that it is the public policy of Louisiana to permit direct actions against the insurer and that is the public policy with which this case is concerned.

We quote the Louisiana court in *Churchman v. Ingram*, 56 So. 2d 297, at page 303 of 56 So. 2d, thus:

"This (the right of direct action) has been held to be an expression of the public policy of this state". Cf. *Davies v. Consolidated Underwriters*, 6 So. 2d 351, *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d 122; *Jackson v. State Farm Mutual Automobile Insurance Company*, 211 La. 19, 29 So. 2d 177.

It is argued, beginning at page 21 of Employers' brief, that the real reason for the insertion of a no-action clause in policies of this character, other than to prevent the knowledge of insurance being had by the court or jury, is to insure that ex delicto actions be brought at the domicile of the tortfeasor where it will be most convenient to it to defend the suit, irrespective of the convenience of the injured party. Again Employers is in error. Employers and many other liability insurance companies write liability policies in Louisiana and it is the law of Louisiana that suits of this character may be brought either at the domicile of the tortfeasor or at the place where the tort occurred. The Louisiana Code of Practice, Article 165 provides as follows:

"There are other exceptions to this rule which require that the defendant be sued before the judge having jurisdiction over the place of domicil or residence; they are here enumerated."

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"In all cases where any person, firm or domestic or foreign corporation shall commit trespass, or do anything for which an action for damage lies or where any domestic or foreign corporation shall fail to do anything for which an action for damage

lies, such person, firm or corporation may be sued in the parish where such damage is done or trespass committed or at the domicile of such person, firm or corporation."

Cf. Tripani v. Meraux, 184 La. 66, 165 So. 453.

Beginning at the bottom of page 21 of its brief and continuing on page 22, Employers argues that the premiums on its policy which must be paid by Gillette vary with the frequency of accidents and the losses incurred through Gillette's negligence and in some manner deems this truism to have a bearing on the constitutionality of the statutes here in question. While confessing our inability to see any connection between that fact and the question of constitutionality, the weight of the argument is lost when it is remembered that the same thing is true of every liability policy. In all cases of which we are aware insurance companies increase the premiums when the experience of the particular assured has been poor and the insurer has been called upon to pay because of the frequency of accidents.

Jurisdictional Question

It is made abundantly clear from the opinion of the Court of Appeals that only Employers and not Gillette is affected by the decision holding the statutes unconstitutional. The Court of Appeals' opinion clearly reveals that Gillette was dismissed from the suit solely upon its objection to the filing of the Watsons' amended complaint seeking to join it as a defendant after removal. The Court of Appeals held squarely that Gillette's dismissal was pre-

licated upon the District Court's exercise of its sound discretion in refusing to permit its joinder by amendment after removal and that the constitutional question was decided exclusively upon Employers' motions and is exclusively applicable to it.

Validity of Proviso

Beginning on page 27 of its brief Employers argues that while the Court of Appeals in this case decreed that portion of the Louisiana statutes involved here permitting direct actions against insurers whether the policy was written and delivered in Louisiana or not, so long as the accident takes place in Louisiana, to be unconstitutional, that decree did not invalidate the statute as a whole.

This is an inconsistent argument because Employers first argues that the Court of Appeals did not hold the statute unconstitutional at all but simply held it not to be applicable to policies issued and delivered outside of Louisiana despite the fact that that provision of the statute is the sole basis of the law suit. In making the argument that the invalidity of the proviso does not affect the statute otherwise, Employers admits that the Court of Appeals did in this case hold the statute unconstitutional. The argument is the same as could be expressed where there is a statute with several provisions which are separable and with a saving clause that the unconstitutionality of one section should not affect the remaining sections. In the present case the sole foundation of this suit is the provision of the statute (Act 541 of 1950) which was held to be unconstitutional by the Court of Appeals.

Further in this connection Employers insists that the constitutional proviso is in reality no law and is a mere nullity. That is begging the question because the proviso questionably stands until the Supreme Court of the United States decrees it to be unconstitutional.

Questions Presented for Review on the Merits

Employers at page 32 of its brief poses the questions presented for review. It poses the questions under its theory that the policy of insurance involved here permits performance in Massachusetts and Illinois and nowhere else. We believe it has been demonstrated earlier in this brief and in the Watsons' original brief that performance in no means is limited to Massachusetts and Illinois performance is to take place in Louisiana and in every other state in which Gillette commits a negligent act resulting in injury to others. Under this heading at page 33 of its brief Employers reasserts that the policy is an indemnity policy. We again repeat that the policy is not indemnity policy but is a liability policy. The difference between an indemnity policy and a liability policy is of some importance and for a full and thorough discussion of these differences we respectfully refer the Court to Appleman's Insurance Law and Practice, particularly Vol. 7, Sec. 4261, pages 26-27 and Vol. 8, Sec. 4831, pages 221-222.

It has further been held that the presence of a "no-action clause" in a liability policy does not change that policy from a liability policy to an indemnity policy. *General Casualty Company v. Larson*, 196 F. 2d 170, 173.

In the cited case the Court said:

"This is not an action for 'indemnity', and the 'No action' clause in the policy does not make it so. This is an action upon the liability contract of the policy whereby the appellant became 'obligated to pay by reason of the liability imposed upon the Insured by law.'"

Likewise on page 33 of its brief Employers argues that in view of the fact that the policy was written in Massachusetts and delivered to the insured in Illinois that fact alone indicates that the contracting parties contemplated that the contract would be governed by the laws of Massachusetts. That contention is best answered by the ruling of this Court in *Hoopston Canning Company v. Cullen*, 318 U.S. 313, 87 L. ed. 777, 63 S. Ct. 602, where at page 782 of 87 L. Ed., page 317 of 318 U.S., the Court said:

"The actual physical signing of contracts may be only one element in a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries. Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction."

A further weakness in such an argument is that Gillette could have just as easily purchased the policy, and

the identical policy, in Louisiana. Employers is authorized to do and does business in Louisiana. Had Gillette so desired this identical policy could have been purchased from Employers in Louisiana. Had that fact taken place, to follow Employers' argument, it is a logical conclusion that such a purchase would have imposed the law of Louisiana upon every other state. Under Employers' argument had an individual been injured because of harmful ingredients in a Toni set in Boston, Massachusetts, that person could have sued Employers directly in Massachusetts without joining Gillette because of the law of Louisiana permitting a direct action against the insurer without joining the insured, and, according to Employers' argument, this provision of the law of Louisiana, because of the mere fact that the policy was ordered and typed in Louisiana, would have transplanted the law of Louisiana to Massachusetts and required Massachusetts to apply it even though it was against the public policy of Massachusetts to permit direct actions against the insurer.

At page 34 of its brief Employers cites *Allgeyer v. State of Louisiana*, 165 U.S. 578, 41 L. Ed. 832, 17 S. Ct. 427 and *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 67 L. Ed. 297, 43 S. Ct. 125. Since *St. Louis Cotton Compress Co. v. Arkansas* was bottomed exclusively on *Allgeyer v. State of Louisiana*, the two cases may be considered together.

What this Court had to say with regard to the holding in *Allgeyer* in its decision in *Hcopeston Canning*

Co. v. Cullen, *supra*, expresses the views of appellants better than we can. There this Court (page 783 of 87 L. Ed., page 319 of 318 U.S.) had this to say:

"While the wisdom of the Allgeyer Case has occasionally been doubted, it is in any case clearly distinguishable here. In that case, no act was done in the state of Louisiana except that of mailing a letter advising the insurance company of a shipment of goods, the goods themselves were in the state only temporarily, and the insurance company never purported to do business in the state. In the instant case, the reciprocals have the many actual contacts with the New York subscribers and the New York property outlined above, much of the insurance covers permanent immovables, and the reciprocals have been licensed to do business there for years. The Allgeyer and subsequent insurance cases have been recently considered in *Griffin v. McCoach*, *supra* (313 US at 506, 507, 85 L ed 1486, 1487, 61 S Ct 1023, 134 ALR 1462) and in *Osborn v. Ozlin*, 310 US 53, 66, 84 L ed 1074, 1079, 60 S Ct 738; as the analysis in those opinions clearly indicates, the Allgeyer line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in the state, and there are many points of contact between the insurer and the property in the state."

Following the citation of Allgeyer and *St. Louis Cotton Compress Co.*, Employers cites *New York Life Insurance Co. v. Head*, 234 U.S. 149, 58 L. Ed 1259, 34 S. Ct. 879 and *Aetna Life Insurance Co. v. Dunken*, 266 U.S. 389, 69 L. Ed. 342, 45 S. Ct. 129, and, further in its

brief cites *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.* 292 U.S. 143, 78 L. Ed. 1178, 54 S. Ct. 634. These cases and those like them were distinguished from cases of the character of the one at bar by this Court itself in *Griffin v. McCoach*. The Supreme Court beginning at page 1487 of 85 L. Ed., page 507 of 313 U.S., effectively distinguished and differentiated those cases cited by Employers from cases like the present one. No good purpose would be served by adding further distinctions to those already pointed out by the Court in *Griffin v. McCoach*, *supra*.

At page 36 of its brief Employers argues that when Congress enacted the McCarran Act (15 U.S.C. 1011-1015) Congress did not intend to clothe the states with any power to regulate the insurance business beyond that which the states previously possessed. From this Employers argues that in view of the McCarran Act having been passed in 1945 and the Acts in contest here have been passed in 1950 necessarily Louisiana attempted to exert power in 1950 that it did not have prior to 1945. We have already demonstrated the fallacy of this argument earlier in this brief wherein it was shown that not only did Louisiana have this power before 1945 but exercised it by passage of Act 55 of 1930, as *Robbins v. Short*, 165 So. 512, clearly shows.

Beginning on page 38 of its brief and continuing through page 45 Employers argues that under *Hartford Accident and Indemnity Co. v. Delta Pine Land Co.*, *supra*, *Home Indemnity Co. v. Dick*, 281 U.S. 397, 74 L. Ed. 926

and *Pritchard v. Norton*, 106 U.S. 124, 27 L. Ed 104, 1 S. Ct. 102 and like cases, Employers is deprived of its property without due process of law. Most of the cases so cited by Employers have been, as previously stated, distinguished by this Court in *Griffin v. McCoach*, supra.

However, *Pritchard v. Norton* is authority for the *Watsons* and is authority against the contentions of Employers. In that case the argument made by Norton and discarded by the Court was the same as that made by Employers here. There the argument was:

"The argument in support of the judgment is simple and may be briefly stated. It is, that New York is the place of the contract, both because it was executed and delivered there, and because, no other place of performance being either designated or necessarily implied, it was to be performed there."

(page 105 27 L. Ed, page 129 of 106 U.S.).

The argument so advanced was rejected by the Court. In that case it was contended that since the contract was executed and delivered in New York the law of New York must prevail over that of Louisiana where the contract was to be performed, just as in this case performance under the policy took place in Louisiana whenever a claim arose under the policy in Louisiana.

Beginning at page 42 of its brief Employers asserts that the contracting parties to the contract acted in good faith and intended that the contract should be governed by the law of Massachusetts. Without impugning the good faith of the parties at all there is nothing whatever

to indicate that the parties contracted with the view of having the contract governed by the laws of Massachusetts. There is nothing within the four corners of the contract so indicating. On the contrary, a reading of the contract indicates that it was the intention of the parties for the contract to be governed by the laws of each state where performance would be required. Nevertheless, if the parties contracted with the view of imposing the law of Massachusetts on the other 47 states of the United States and on Canada and Newfoundland, the laws and public policies of these other states and countries may not be so highhandedly subordinated to the law of Massachusetts by the action of two private corporations. *Robertson vs. California*, 328 U.S. 440, 90 L. Ed. 1366, 66 S. Ct. 1160.

At page 44 of its brief Employers states that "when issued, the contract was not subject to Louisiana law". It was pointed out in the Watsons' original brief that when the contract was issued the statutes in question were the law of Louisiana and when the contract was issued and performance contemplated in Louisiana it was subject to Louisiana law. See page 17 of original brief. Further in this connection Employers argues that since Act 541 of 1950 does not recognize a right of action on a policy issued outside of the state until an accident occurs in Louisiana, necessarily the contract was not to be effective in Louisiana, or differently stated, performance was not to be in Louisiana. No contract ripens until the obligation thereof matures and in this respect an insurance contract is no different from any other. Neither party to a contract may sue upon it until the obligation matures and

obviously no suit may be maintained upon an insurance contract until one of the risks contemplated by the policy comes into being.

Constitutionality of Act 542 of 1950

Even though the Watsons conceded that while under Act 542 of 1950 Employers was required to consent in writing that it could be sued directly on all policies whether written in Louisiana or not on accidents occurring in Louisiana, that statute was of no particular importance in view of the provisions of Act 541 of 1950. Nevertheless, Employers argues the unconstitutionality of this Act at pages 46 through 48 of its brief.

Despite Employers contention that the Court of Appeals held neither Acts 541 nor 542 unconstitutional but held that they were inapplicable, there is no escape from the fact that Employers did sign the consent to be sued required by Act 542. It is obvious, without laboring the point, that the only way in which Employers may avoid the effect of its compliance with the Act and the fact that it did sign the consent is for the Court to hold that its consent was coerced by an unconstitutional statute. In other words, it appears clear that since Employers complied with the statute, its compliance may only be avoided by a holding by this Court that its compliance is ineffective because that compliance was given through the compulsion of an unconstitutional statute. Unless that particular statute is decreed to be unconstitutional, then Employers is bound by its written consent. Thus it will be seen that by this argument Employers has shown most

clearly that the constitutionality of a state statute is involved and that this Court has jurisdiction on appeal.

Louisiana Direct Action Statute is Procedural

Beginning at page 51 and continuing through the major portion of page 54 of its brief Employers contends that the direct action statutes of Louisiana are not procedural and takes issue with appellants' position that they are.

On page 52 of Employers brief it is stated that the latest expression on the subject by the Louisiana courts is to be found in *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d 122. Aside from the fact that this case is *not* the last expression of the Louisiana courts, even it does not support Employers' position.

While it is true that the court in that case stated that Act 55 of 1930 confers substantive rights the court did not use the word "substantive" in the sense contended for by Employers. What the court meant by the word "substantive" as used in that decision was an alternative to "valuable". It appears clear from a reading of the *West* decision that the court was using the word substantive in the sense that the statute conferred a right on an injury party which was of substantial value. The use of the word by the court in that case was comparable to the remedy provided by the death statute of Louisiana in that a cause of action for wrongful death exists which is a substantial right and that once that right accrues it cannot be defeated by a repeal of the remedy to enforce the statute. It was in that sense and that sense only that

the word was used and not in the sense that the statute itself was not a procedural statute. In truth, the latest cases on the subject are *Home Indemnity Co. v. Highway Insurance Underwriters*, 222 La. 540, 62 So. 2d 828 and *Churchman v. Ingram*, 56 So. 2d 297.

West v. Monroe Bakery was decided in March, 1950. *Churchman v. Ingram* was decided in December, 1951 and *Home Indemnity Company v. Highway Insurance Underwriters* was decided in December, 1952.

It so happens that in *Churchman v. Ingram*, *supra*, the same contentions raised by Employers in this case were passed upon by the Court contrary to Employers' contentions and the court held the statutes in question to be constitutional. The reasoning of the court, we submit, is sound.

The Supreme Court in *Home Indemnity Company v. Highway Insurance Underwriters*, *supra*, in referring to these statutes and in stating that they are procedural, spoke as follows:

"It is manifest that both of these acts treat of provided remedies and not of contractual obligations; they are not restrictions of rights of action but are remedial enlargements and remedies of procedure to better insure recovery for an injured person, or a person suffering property damage. The Legislature evidently felt that our courts should not be made to become circumlocution officers winding and unwinding red tape, but felt that the nearest point to a given object was a straight line—it en-

acted the provision of a direct action and with due care gave an interpretation of the provisions of Act No. 55 of 1930, as amended, when it expressed its *intent* as to the limitation of the scope of operation on the remedial act." (p. 831 of 62 So. 2d).

Both the Supreme Court of Mississippi and the Court of Appeals for the Fifth Circuit, sitting as a Texas Court in a diversity case, have considered the Louisiana direct action statute and held it to be procedural, following the Louisiana courts on the subject. See *McArthur v. Maryland Casualty Co.*, 184 Miss. 663, 186 So. 305, and *Wells v. American Employers Ins. Co.*, 132 F. 2d 316.

In the Mississippi case of *McArthur v. Maryland Casualty Company*, *supra*, the Court, in considering statutes of Rhode Island and Wisconsin, similar to the Louisiana statutes, concluded from an examination of the decisions of the courts of those states, that the statutes of those states are likewise procedural. The Court, at page 307 of 186 Southern, stated:

" . . . the courts of those states (Rhode Island and Wisconsin) have likewise construed the provisions thereof to be procedural and remedial only."

The Watsons are criticized for stating on pages 8, 9, 12 and 25 of their original brief that the Louisiana courts have "consistently" and "without" exception held that the direct action action statutes are procedural. That statement was made advisedly and it is true. The only conceivable exception is *West v. Monroe Bakery*, *supra*, and when that case is read in the light of its facts

it is readily seen, as above pointed out, that the word "substantive" was not used in the sense contended for by Employers, but as synonymous with "substantial". That this is true is demonstrated by the decision of the Louisiana Court of Appeal in *Churchman v. Ingram*, supra, which was decided after *West v. Monroe Bakery* and before *Home Indemnity Co. v. Highway Insurance Underwriters*. The Court of Appeal obviously did not consider *West v. Monroe Bakery* as holding that the statutes were substantive legislation.

If the Watsons are wrong in this interpretation, nevertheless *West v. Monroe Bakery* is no longer the law because if it can be considered as a holding that the statutes are substantive legislation, it is in direct conflict with the later decision of the Supreme Court of Louisiana in *Home Insurance Co. v. Highway Insurance Underwriters*, supra. It must be considered repudiated by the later decision.

On page 53 of its brief Employers argues that considering *West v. Monroe Bakery* as the latest expression of the State Court, it was the law when the present case was decided by the District Court. Employers says that since *West vs. Monroe Bakery* was the law at that time, despite the fact that the Supreme Court of Louisiana in the *Home Indemnity Company Case* decided differently in December 15, 1952, the Court of Appeals in the present case was bound to affirm the District Court decision, based as it was, so Employers contends on *West v. Monroe Bakery* which it says was the law when the District Court

case was decided, even though the Home Indemnity Company case was decided before the Court of Appeals decided the present case on February 27, 1953 after the decision of the Supreme Court of Louisiana in the Home Indemnity Company case which was decided December 15, 1952.

Once again Employers is in error. The correct rule of decision has been handed down by this Court in *Huddleston v. Dwyer*, 322 US 232, 88 L. Ed. 1246, 64 S. Ct. 1015. In that case the Supreme Court of the United States said:

"It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. *Meredith v. Winter Haven*, 320 US 228, ante, 9, 64 S. Ct. 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones."

(p. 1249 of 88 L. Ed., p. 236 of 322 U.S.).

Precisely in point on this issue is *Vandenbark v. Owens-Illinois Glass Company*, 311 US 538, 85 L. Ed. 327, 61 S. Ct. 347. There the question was:

"This certiorari brings before us for review the determination of the Circuit Court of Appeals that cases at law sounding in tort, brought in the federal courts on the ground of diversity of citizenship, are ruled by the state law as declared by the state's highest court when the judgment of the trial court

is entered and not by the state law as so declared... at the time of entry of the appellate court's order of affirmance or reversal."

(p. 327 of 85 L. Ed., p. 538 of 311 U.S.).

The question was answered precisely as it was in *Huddleston v. Dwyer*, supra; precisely as the Watsons contend and exactly contrary to Employers' position.

Louisiana Direct Action Statute is not Unique.

Beginning on page 54 and continuing through page 55 Employers contends that the Louisiana direct action statute is unique and that Louisiana is "the *only* state which has a statute permitting the injured person to file a direct action at law, against a liability insurer alone, where the policy was voluntarily obtained by the insured." This statement is not only misleading but is entirely erroneous.

Wisconsin, at least, has a similar statute. In *Tillman v. Great American Indemnity Co.*, 207 F. 2d 588 at page 590 the Court of Appeals for the 7th Circuit in deciding a case involving Wisconsin law stated that under Wisconsin law the plaintiff could bring the action against the insurance company without joining the insured. The court there said:

"Under Wisconsin law plaintiff could and did bring the action against the insurance company without joining the driver of the automobile as a party defendant. Secs. 85.93 and 260.11, Wis. Stats.; *Elliott v. Indemnity Insurance Co. of North America*, 201 Wis. 445, 230 N.W. 87."

Employers further argues that there is something sacred about an insured *voluntarily* obtaining a liability policy. The significance of such an argument is entirely lost when it is borne in mind, even under the law of states requiring liability insurance, that the insurance company still is the one which *voluntarily* writes the policy. Even in states having statutes requiring owners of automobiles to carry liability insurance there is nothing in those statutes requiring any particular company to write the insurance. It still remains with the individual insurance company to write the policies or not. It is entirely voluntary with each individual company whether it will assume a risk. This is made manifest by the decision of the Supreme Court in *Merchants Mutual Automobile Liability Ins. Co. v. Smart*, 267 U.S. 126, 69 L. Ed 538, 45 S. Ct. 320, where the Court said at page 542 of 69 L. Ed, page 130 of 267 U.S.:

"It is to be remembered that the assumption of liability by the Insurance Company under § 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so."

When it is borne in mind that the question of voluntary issuance of the policy rests with the insurer the decision of the District Court in *Boyles v. Farmers Mutual Hail Insurance Co.*, 78 F. Supp. 706 is pertinent.

There at page 709 the Court said:

"That the insurance carrier may be joined in an action without impleading the insured is established by several Kansas cases, inter alia, *Dunn v. Jones*,

supra; Meyer Sanitary Milk Co. v. Casualty Reciprocal Exchange, 145 Kan. 501, 66 P. 2d 619; Farmer v. Central Mutual Ins. Co., 145 Kan. 951, 67 P. 2d 511; State Highway Commission v. American Mutual Liability Ins. Co., 146 Kan. 187, 70 P. 2d 20; and Hudson v. Ketchum, 156 Kan. 332, 133 P. 2d 171." (p. 709-710).

Likewise pertinent is the Georgia law (Geo. Code of 1933, par. 68-612) where it is provided that as to common carriers "it shall be permissible to join the motor carrier and the insurance carrier in the same action whether arising in tort or contract." *Acme Freight Lines v. Blackman*, 131 F. 2d 62.

Conflict of Law Questions

It is urged by Employers that the Watsons are in error in their contention that a federal court sitting in Louisiana in diversity cases is bound by the Louisiana conflict of laws rules. Employers has been answered by the Supreme Court of the United States. In *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 85 L. Ed 1177, 61 S. Ct. 1029, the Court held:

"We are of the opinion that the prohibition declared in *Erie R. Co. v. Tompkins*, 304 US 64, 82 L. Ed 1188, 58 S. Ct. 817, 114 ALR 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state

and federal courts sitting side by side. See *Erie R. Co. v. Tompkins*, *supra*, at 74-77. Any other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributed to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. Cf. *Milwaukee County v. M. E. White Co.*, 296 US 268, 272, 80 L ed 220, 225, 56 S Ct 229. This Court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston Co.* 290 US 163, 78 L ed 243, 54 S Ct 134. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be." (P. 1480 of 85 L. Ed., p. 496 of 313 U.S.).

In *Griffin v. McCoach*, 313 U.S. 498, 85 L. Ed 81, 61 S. Ct. 1023, this Court said:

"We are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit." (p. 1485 of 85 L. Ed., p. 503 of 313 U.S.).

In *Magnolia Petroleum Company v. Hunt*, 320 S. 430, 88 L. Ed. 149, 64 S. Ct. 208, the Court said:

"In the case of local law, since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state, even though that law is of controlling force in the courts of that state with respect to the same persons and events." (p. 154 of 88 L. Ed., p. 436 of 320 U.S.).

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 89 L. Ed. 2078, 65 S. Ct. 1464, the Court said:

"And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof, *Cities Serv. Oil Co. v. Dunlap*, 308 US 208, 84 L ed 196, 60 S Ct 201 as to conflict of laws, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 US 487, 85 L. ed 1477, 61 S. Ct. 1020, as to contributory negligence, *Palmer v. Hoffman*, 318 US 109, 117, 87 L. ed 645, 651, 63 S Ct 477, 144 ALR 719." (2086 of 89 L. Ed., p. 109-110 of 326 U.S.).

In *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 97 L. Ed. 1211, 73 S. Ct. 856, this Court in dealing with the conflict of laws question had this to say:

"The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state." (p. 1215 of 97 L. Ed., p. 516 of 345 U.S.).

See also *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 86 L. Ed. 152, 62 S. Ct. 241 and *Angel v. Bullington*, 330 U.S. 183, 91 L. Ed. 832, 67 S. Ct. 657.

It is the duty of a Federal Court after determining the conflict of laws rule of the state to set that rule at naught only when it is found that the rule is arbitrary and unreasonable and for that reason is thus in conflict with the United States Constitution. It is submitted that there is nothing arbitrary or unreasonable in the characterization of the questioned statutes by the Louisiana courts in determining the appropriate law to be applied to this case.

Public Policy of Louisiana

It has been pointed out earlier in this brief that the courts of Louisiana have unmistakably stated the public policy of Louisiana to be that a direct action may be maintained on a liability insurance policy; that these policies are written for the benefit of the injured party and not for the benefit of the insured in the primary sense.

The police power of the state enables it to regulate its public policy. The police power is restricted by constitutional bounds only and is unlimited otherwise. The police power is not a fixed condition but is the operation of social, economic and political conditions. As long as these conditions vary the police power must continue to be elastic and capable of development. The police power aims directly to secure and protect the public's welfare and it does so by restraint and compulsion.

A good example of the flexible police power vested in the states is illustrated in *Young v. Masci*, 289 U. S. 253, 77 L. Ed. 1158, 53 S. Ct. 599. In that case, Young, citizen of New Jersey, loaned an automobile to another in New Jersey with permission either expressed or implied to drive the car into New York. A New York statute made the owner of the car liable for the driver's negligence when used with his permission. The driver of Young's car had an accident in New York and the injured party brought suit in New Jersey. Under the law of New Jersey, Young had no liability. The Supreme Court said:

"Moreover, the contract of bailment could not have conferred upon the owner immunity from liability to third persons for the driver's negligence. Liability for a tort depends upon the law of the place of the injury; and (apart from the effect of the full faith and credit clause, which is not here involved) agreements made elsewhere cannot curtail the power of a State to impose responsibility for injuries within its borders." (P. 1160 of 77 L. Ed, p. 258 of 289 U.S.)

Further in the same case, on the same page, the Court said:

"When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master and servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury

whether the means employed be a responsible agent or an irresponsible instrument. The cases are many in which a person acting outside the State may be held responsible according to the law of the State for injurious consequences within it."

At pages 58-61 Employers endeavors to distinguish the cases of this Court cited by and relied upon by the Watsons in their original brief. The effort is a distinct failure, since these cases are most appropriate. In passing, however, it is necessary to here note Employers' criticism of *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 87 L. Ed. 777, 63 S. Ct. 602.

Employers urges that the distinction between that case and this one is that Hoopeston concerned *immovables*. The distinction is one without a difference. While immovables were involved in the case, the decision was not based upon that fact. Furthermore, it is most inappropriate for Employers to urge upon this Court that real property is entitled to greater consideration than human health and human life and that this Court has and should place property rights above human well being and give property rights a preferred status.

In conclusion, it is interesting to note the same Court, the United States District Court for the Western District of Louisiana, which decided the case now before the Court, through another of its judges, held the very statutes in controversy here, to be constitutional in, we submit, a well reasoned and correctly decided opinion. See *Baxton v. Midwest Ins. Co.*, 102 F. Supp. 500.

CONCLUSION

It is respectfully submitted that the Louisiana statutes in question are constitutional and constitute a valid exercise of the state's police power. We further submit that the decree of the Courts below should be reversed, the statutes held to be constitutional and the case remanded to the District Court for further proceedings.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. 693 29

B. CLINTON WATSON, ET UX.,

Appellants,

vs.

EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM**

BENJAMIN C. KING,
CHARLES D. EGAN,
Counsel for Appellees.

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IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 14316

B. CLINTON WATSON, ET UX.,

Appellants,

versus

EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL.,

Appellees

**STATEMENT IN OPPOSITION TO APPELLANTS'
STATEMENT OF JURISDICTION AND MOTION TO
DISMISS OR AFFIRM.**

Appellee, Employers Liability Assurance Corporation, Ltd., in its statement in opposition to appellants' jurisdictional statement herein and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

1. Statement of Issues on Appeal

The facts set forth in appellants' jurisdictional statement are corrected and modified to show the following:

It is undisputed that a policy of public liability insurance was issued and delivered by appellee, Employers Liability Assurance Corporation, Ltd., to the Gillette Safety Razor

Company and a copy of said policy was delivered to The Toni Company, a division of the Gillette Safety Razor Company, in Chicago, Illinois. After the policy was issued, but before the present action was brought, the name of the Gillette Safety Razor Company was changed to The Gillette Company. The policy of insurance covered liability "imposed by law" upon the assureds, Gillette Safety Razor Company, The Toni Company, and The Gillette Company, arising out of the use of the products of the named insureds. The policy contained, among others, the following provisions (referred to by appellants as a "no action" clause), to-wit:

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company:

"Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability." (Italics ours.)

"Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes." (Italics ours.)

It is undisputed that the provisions of the policy hereinabove quoted were entirely lawful and valid under the laws of Massachusetts and Illinois; that the obligation of the assureds, if any obligation there be to appellants, has never been determined, either by judgment against the assureds

or by written agreement of the assureds, the claimant and the insurance company; and that under the laws of Massachusetts and Illinois a direct action against Employers Liability Assurance Corporation, Ltd., prior to the determination of the assureds' obligation, either by judgment against the assureds after actual trial or by agreement, is prohibited.

Appellants, relying upon the provisions of Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 (the Louisiana Direct Action Statute), proceeded in the original complaint against Employers Liability Assurance Corporation, Ltd., alone. Supplemental and amended complaints were filed, seeking to join Gillette Safety Razor Company and The Gillette Company as defendants and praying for judgment against said companies, in solido.

It is undisputed that appellants' cause of action is based upon the alleged negligence of The Gillette Company and Gillette Safety Razor Company, and that appellants have no cause of action against the Employers Liability Assurance Corporation, Ltd., unless they have a cause of action against Gillette Safety Razor Company and The Gillette Company.

It is undisputed that Gillette Safety Razor Company, The Gillette Company and The Toni Company have never been authorized to do business in the State of Louisiana, and that the product referred to by appellants as a "Toni Home Permanent" was manufactured in Illinois and sold to appellants by Morgan & Lindsey Company in Arcadia, Louisiana.

Appellee, Employers Liability Assurance Corporation, Ltd., moved to dismiss the action on that ground that "Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 and Acts 541 and 542 of the Louisiana Legislative Session of 1950, under which this proceeding is brought, *do not apply under the facts of this case, or, if applicable,*

violate the provisions of the Federal and Louisiana Constitutions", namely, Section 1, Article 4 (full faith and credit), Section 10, Article 1 (impair the obligations of a contract), Section 1 of the Fourteenth Amendment (due process and equal protection of laws) of the Constitution of the United States, and Section 15 of Article 4 of the Constitution of the State of Louisiana.¹

The judgment of the District Court, which was affirmed by the Court of Appeals, dismissed the entire action, not only as to Employers Liability Assurance Corporation, Ltd., but also as to Gillette Safety Razor Company and The Gillette Company. Gillette Safety Razor Company and The Gillette Company were parties of record in the Court of Appeals.

It is undisputed that the Louisiana Direct Action Statutes are valid and presently apply to policies written and delivered by foreign public liability insurers in Louisiana. The Court of Appeals did not declare that the said statutes are invalid, but construed the statutes and declared that, if construed to have extra-territorial effect, they violate the appellee's constitutional rights.²

¹ The applicable grounds of the motion to dismiss filed by Employers Liability Assurance Corporation, Ltd. are set forth at length in Footnote 5 of the opinion of the Court of Appeals, a copy of which is attached to appellants' jurisdictional statement.

² "We find ourselves, however, in complete accord with the views of the district judge that if the statute is *construed* as extending to and invalidating the 'no action' provision of a policy written and delivered, as this one was, outside of the state, the statute represents an attempt to give extra territorial effect to Louisiana laws and to subject to them the doing of business, and the business done, in other states. So construed, we are in doubt that, as contended by Employers and as found by the district judge, it violates the defendant's constitutional rights.

"This being so, it is clear that the decisions which settle it that consent to the deprivation of constitutional rights given as the extorted price of doing business in a state cannot prevent the assertion of those rights when they are challenged or sought to be denied, apply in full vigor here." (See opinion of the Court of Appeals.) (Italics ours.)

2. Motion to Dismiss

Appellee, Employers Liability Assurance Corporation, Ltd., pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed for the following reasons:

(1) Appellee does not contend, nor did the Court of Appeals hold, that the state statutes involved are invalid, but only that they are inapplicable to the facts of this case. The judgment of the court below went no further than a holding that the statutes, if construed to apply to the facts of this case, violate the defendant's constitutional rights in the respects stated in the opinion. The appeal herein should be dismissed for want of jurisdiction, it appearing that the Court of Appeals, in determining this case, did not hold state statutes to be invalid as repugnant to the Constitution, treaties or laws of the United States, but merely construed the same. The provisions of the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. 1254(2), are therefore inapplicable.

Knop v. Monongahela River Consol. Coal & Coke Co.,
211 U. S. 485, 487, 488, 53 L. Ed. 294, 295, 29 S. Ct.
188;

Bradford Electric Light Co. v. Clapper, 284 U. S. 221,
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Westling v. U. S., 288 U. S. 590, 591, 77 L. Ed. 969,
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Perry v. King County, 141 U. S. 668, 35 L. Ed. 895, 12 S. Ct. 128.

(2) In the alternative, even if it be found that the Court of Appeals' decision rests, in part, upon a holding that the state statutes are invalid, nevertheless the decision also rests upon wholly independent grounds insofar as The Gillette Company and Gillette Safety Razor Company are concerned, which are not subject to review by means of appeal under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. 1254(2), and the appeal should not be entertained.

United States v. Hastings, 296 U. S. 188, 193, 80 L. Ed. 148, 150, 151, 56 S. Ct. 218.

(3) Citations were not served upon The Gillette Company and Gillette Safety Razor Company, parties of record in the court below, as prescribed by Rule 10 of the Revised Rules of the Supreme Court of the United States. This omission was deliberate on the part of the appellants and did not result from accident or mistake.³

Osage Oil & Refining Co. v. Mulver Oil Co., 38 F. (2d) 396.

(4) The appeal should be dismissed for want of proper parties, as The Gillette Company and Gillette Safety Razor Company, parties of record in the court below, in whose favor, as well as Employers Liability Assurance Corporation, Ltd., the decree was rendered, are directly and vitally interested therein and are necessary parties to the appeal.

³ "That portion of the case however, that is, the portion involving the Gillette Safety Razor Company as a defendant is not involved in this appeal." (See appellants' jurisdictional statement.)

Appellants' jurisdictional statement shows that the cause of action is based upon the asserted negligence of The Gillette Company and Gillette Safety Razor Company, and any final decision in this case would require a determination thereof. The case should not be brought up by appeal in fragments or piecemeal.

Metropolitan Trust Co. of City of New York, In Re,

218 U. S. 312, 320, 54 L. Ed. 1051, 1054, 31 S. Ct. 18;

Wilson v. Kiesel, 164 U. S. 248, 251, 41 L. Ed. 422, 423, 17 S. Ct. 124;

Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169, 76 L. Ed. 685, 52 S. Ct. 354;

Collins v. Miller, 252 U. S. 364, 64 L. Ed. 616, 40 S. Ct. 347;

Arnold v. United States, 263 U. S. 427, 68 L. Ed. 371, 44 S. Ct. 144;

Martinez v. International Banking Corp., 220 U. S. 214, 55 L. Ed. 438, 31 S. Ct. 408.

(5) The assignment of errors accompanying this appeal does not set out expressly and particularly each error asserted. Vague and general statements are substituted for the particularity prescribed by Rule 9 of the Revised Rules of the Supreme Court of the United States.

Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 91, 77 L. Ed. 180, 184, 53 S. Ct. 32;

Phillips & Colby Constr. Co. v. Seymour, 91 U. S. 646, 648, 23 L. Ed. 341, 342;

Briscoe v. Rudolph, 221 U. S. 547, 549, 550, 55 L. Ed. 848-850, 31 S. Ct. 679.

3. Motion to Affirm

Appellee, Employers Liability Assurance Corporation, Ltd., pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the

judgment of the court below be affirmed for the following reasons:

(1) The mere construction of a state statute does not present a Federal question.

Knop v. Monongahela River Consol. Coal & Coke Co.,
211 U. S. 485, 487, 488, 53 L. Ed. 294, 295, 29 S. Ct.
188.

(2) The questions on which the decision of the case depends are so well settled as not to need further argument. It is well settled that, although a state may limit or prohibit the making of certain contracts within its own territory, it cannot extend the effects of its laws beyond its boundaries so as to destroy or impair the rights of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 149, 150, 78 L. Ed. 1178, 1181, 1182, 54 S. Ct. 634;

New York L. Ins. Co. v. Head, 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879;

Actna L. Ins. Co. v. Dunken, 266 U. S. 389, 399, 62 L. Ed. 342, 349, 45 S. Ct. 129;

Home Ins. Co. v. Dick, 281 U. S. 397, 407, 408, 74 L. Ed. 926, 933, 934, 50 S. Ct. 338.

Consent to the deprivation of constitutional rights given as the extorted price of doing business in a state cannot prevent the assertion of its rights when they are challenged or sought to be denied.

Home Insurance Co. of New York v. Morse, 87 U. S. 445, 20 Wall. 445, 22 L. Ed. 365;

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 400, 72 L. Ed. 927, 929, 48 S. Ct. 553;

- Terral v. Burke Constr. Co.*, 257 U. S. 529, 66 L. Ed. 352, 42 S. Ct. 183;
- Hanover Fire Ins. Co. v. Carr*, 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179;
- Frost v. Railroad Commission of California*, 271 U. S. 583, 70 L. Ed. 1101, 46 S. Ct. 605;
- Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 S. Ct. 619;
- Power Manufacturing Co. v. Saunders*, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678;
- W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423;
- Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623, 45 S. Ct. 324;
- Lafayette Insurance Co. v. French*, 59 U. S. 404, 18 How. 404, 15 L. Ed. 451;
- Barron v. Burnside*, 121 U. S. 186, 30 L. Ed. 915, 7 S. Ct. 931;
- Southern Pac. Co. v. Denton*, 146 U. S. 202, 207, 36 L. Ed. 942, 945, 13 S. Ct. 44;
- Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 79, 80, 82 L. Ed. 673, 677, 58 S. Ct. 436;
- Williams v. Standard Oil Co. of La.*, 278 U. S. 235, 241, 73 L. Ed. 287, 49 S. Ct. 115;
- State of Washington ex rel. Bond & Goodwin & Tucker v. Superior*, 289 U. S. 361, 77 L. Ed. 1256, 1260, 53 S. Ct. 624;
- Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629, 80 L. Ed. 943, 56 S. Ct. 611;
- Schwegmann Bros. v. La. Board*, 216 La. 148, 43 So. (2d) 248.

(3) Appellee's obligations under the contract of insurance cannot be enlarged by reason of the alleged interest of the State of Louisiana in the transaction.

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, 149, 150, 78 L. Ed. 1178, 1181, 1182, 54 S. Ct. 634.

For the foregoing reasons, it is evident that a direct appeal from the Court of Appeals for the Fifth Circuit should not be allowed under the facts of this case and that this appeal presents no substantial question. It is, therefore, respectfully submitted that the within appeal should be dismissed, or that the judgment and decree of the Court of Appeals for the Fifth Circuit should be affirmed.

Dated this 19th day of March, 1953.

(Signed) BENJAMIN C. KING,

(Signed) CHARLES D. EGAN,

Attorneys for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX

Appellants

vs.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL**

Appellees

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**MOTION TO DISMISS
FOR LACK OF CERTIORARI JURISDICTION**

**BENJAMIN C. KING,
CHARLES D. EGAN,**
Attorneys for Appellee

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX

Appellants

vs.

EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO DISMISS FOR LACK OF CERTIORARI JURISDICTION

Appellee, Employers Liability Assurance Corporation, Ltd., pursuant to Rule 7 (3), Paragraph 3, of the Revised Rules of the Supreme Court of the United States, respectfully moves that the order entered herein on May 3, 1954, granting the petition for writ of certiorari, be vacated and that the writ of certiorari be dismissed for the following reasons:

1. Judgment was entered in the above entitled cause by the Court of Appeals for the Fifth Circuit on

February 27, 1953. U.S.C. Title 28, Sec. 1254 (1) provides that the Supreme Court of the United States may review cases in the courts of appeals "by writ of certiorari granted *upon the petition of any party* to any civil or criminal case, before or after rendition of judgment or decree." It appears that no petition for certiorari has been filed in this cause by any party hereto and that this Court lacks certiorari jurisdiction.

2. A petition for appeal and attached appeal papers were filed by appellants in this Court on March 31, 1953, and jurisdiction of this Court was invoked under U.S.C. Title 28, Sec. 1254 (2).⁽¹⁾ That statute provides that an appeal from a court of appeals decision "*shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the federal questions presented.*"⁽²⁾

3. Appellants, at the end of their Jurisdictional Statement under a heading entitled "Alternate Certiorari Application", state that they "*are also applying for certiorari with respect to the same judgment.*"⁽³⁾ However, no separate petition for certiorari to review the judgment of the court of appeals has ever been filed in this cause by appellants or any party hereto.

1. See Jurisdictional Statement filed by appellants.

2. U.S.C. Title 28, Sec. 1254 (2).

3. The last paragraph of appellant's Jurisdictional Statement, entitled "Alternate Certiorari Application", follows verbatim the language used in a form in West's Federal Forms, Vol. 1, Sec. 203, at page 200. However, note the comment of Harold B. Willey immediately following said form at page 200. (Footnote 4(b) *infra*.)

4. The mere assertion by appellants, at the end of their Jurisdictional Statement, that they "*are also applying for certiorari*" does not constitute a petition for certiorari nor comply with the provisions of Rule 38 of this Court.

5. Appellants, in the "Alternate Certiorari Application" hereinabove referred to, rely upon *Bradford Electric Light Company v. Clapper*, 284 U.S. 221, 52 S. Ct. 118, 76 L. Ed. 254. That decision merely holds that if the appeal from a court of appeals decision is dismissed as improvident, the Court is still free to consider a timely application for certiorari on its own merits. In the same case, in the decision on the merits, this Court said: "The company filed in this Court *both* an appeal and a petition for writ of certiorari. The appeal was denied, and certiorari granted." (*Bradford Electric Light Company v. Clapper*, 286 U.S. 145, 151, 52 S. Ct. 571, 76 L. Ed. 1026, 1031). In sharp contrast, appellants in the present case filed only appeal papers and no separate timely application for certiorari has ever been filed.

6. It appears that this Court has no authority to treat the appeal papers filed by appellants as a petition for certiorari to the Court of Appeals for the Fifth Cir-

entit.⁽⁴⁾ The absence of such authority is clearly expressed in U.S.C. Title 28, Sec. 1254 (2). In sharp contrast are the express provisions of U.S.C. Title 28, Sec. 2103⁽⁵⁾ requiring this Court to treat the papers whereon an improvident appeal is taken from a decision of *the highest court of a state* as a petition for certiorari.

7. More than ninety (90) days have expired since the entry of judgment in this case by the Court of Appeals for the Fifth Circuit, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court. (U.S.C. Title 28, Sec. 2101 (c) and Rule 38 of this Court).

4. (a) Stern & Gressman, Supreme Court Practice, page 18: "If an appeal under Sec. 1254 (2) is found to have been improvidently taken, **the Supreme Court has no authority to treat the appeal papers as a petition for certiorari to the court of appeals.** The absence of such authority is in sharp contrast to the express provision of 28 U.S.C. Sec. 2103."
- (b) West's Federal Forms, Vol. 1, page 200 (Comment by Harold B. Willey): "If an appeal is taken from a judgment of a Court of Appeals where the proper method of review is by petition for writ of certiorari **the court has no jurisdiction to treat the appeal papers as a petition for writ of certiorari** as is the case when an appeal is mistakenly taken from a judgment of a state court, but it can entertain a **separate** petition for a writ of certiorari provided the latter is timely filed."
- (c) Simkin's Federal Practice, 3rd Ed., Sec. 943, page 674: "**The (appeal) papers cannot be treated as a petition for certiorari,** as in the case where appeals are improvidently taken from state court judgment."
- (d) Moore's Commentary on the U.S. Judicial Code, Sec. 0.03(53), page 553: "There is, however, no provision in Sec. 1254 which authorizes an improvident but timely appeal from the court of appeals to be treated as a petition for certiorari, as Sec. 2103 authorizes in case of an appeal from a state court."
5. U.S.C. Title 28, Sec. 2103 provides in part as follows: "If an appeal to the Supreme Court is improvidently taken from the decision of the **highest court of a State** in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but **the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.**"

8. This motion is not based upon grounds already advanced in opposition to the granting of the writ of certiorari. No notice of the filing of a petition for certiorari, together with a copy of said petition, printed record or supporting brief was ever served upon appellee or its counsel. In fact, it appears that no petition for certiorari was ever filed by appellants in any way complying with the provisions of Rule 38 of this Court. Accordingly, appellee has had no previous opportunity or reason to file a brief in opposition to the granting of the writ of certiorari.

THEREFORE, it appears that this Court lacks certiorari jurisdiction; no timely petition for a writ of certiorari was filed by appellants. The order entered herein on May 3, 1954, granting the petition for writ of certiorari, should be vacated and the writ of certiorari should be dismissed.

Respectfully submitted,

Charles D. Egan

Benjamin C. King

Attorneys for Appellee,
Employers Liability
Assurance Corporation, Ltd.

Dated this _____ day of June, 1954.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B CLINTON WATSON, ET UX
Appellants-Petitioners

VS.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD. ET. AL**
Appellee-Respondent

BRIEF ON BEHALF OF APPELLEE-RESPONDENT

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B CLINTON WATSON, ET UX

Appellants-Petitioners

VS.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD. ET. AL**

Appellee-Respondent

BRIEF ON BEHALF OF APPELLEE-RESPONDENT

OPINIONS DELIVERED IN THE COURTS BELOW

Appellants' brief correctly shows that in this case the opinion of the District Court is reported at 107 F. Supp. 494, and affirmed by an opinion of the Court of Appeals for the Fifth Circuit, reported at 202 F. 2d 407. On page 9 of their brief, appellants recognize that this case is a companion to the case of *Bish v. Employers' Liability Assurance Corporation*, 102 F. Supp. 343, affirmed 202 F. 2d 954. The opinion of the Court of Appeals in the present case (R.39) states that this case is one of a series of five tort actions. Actually, this case is one of a series of eight companion cases, all directly dealing with the identical

problem and uniformly supporting the decision in this case. The opinions of the United States District Courts and Court of Appeals, Fifth Circuit, are interwoven in this series of cases, and each, in substance, adopts the reasoning of the other, and adds slightly thereto. In order to have the complete basis of the opinions of the courts below in this case, the opinions of those courts in the other cases must be carefully reviewed. They are:

Belanger v. Great American Indemnity Co., 89 F. Supp. 736, affirmed 188 F. 2d 196;

Bayard v. Traders and General Insurance Company, 99 F. Supp. 343, motion for new trial denied, 104 F. Supp. 7;

Bish v. Employers Liability Assurance Corporation, 102 F. Supp. 343, affirmed 202 F. 2d 954;

Fisher v. Home Indemnity Company, 198 F. 2d 218;

Employers Mutual Liability Insurance Company v. Eunice-Rice Milling Company, 198 F. 2d 613, certiorari denied, 344 U. S. 876, 97 L. Ed. 679, 73 S. Ct. 171;

Mayo v. Zurich General Accident and Liability Co., 106 F. Supp. 579;

Mobley v. Kansas City Southern Railway Company, 202 F. 2d 117.

The opinions delivered by the courts below in this case are memorandum opinions incorporating the reasoning in the seven companion cases above set forth, all of which directly support the position of appellee and the decision rendered in this case. It will be noted that in *Employers*

Mutual Liability Insurance Co. v. Eunice Rice Milling Co., supra, this Court has recently denied a petition for certiorari to review the issues here involved.

JURISDICTION OF THE SUPREME COURT

Jurisdiction of this Court is invoked on appeal under the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 928; 28 U. S. C. 1254 (2). The judgment of the Court of Appeals was rendered on February 27, 1953 (R. 45) and the petition for appeal was filed March 7, 1953 (R. 46). No petition for certiorari has ever been filed in this action. Appellee filed a timely motion to dismiss or affirm and the question of the jurisdiction of this Court on appeal, by order dated May 3, 1954 (R. 51), was postponed to the hearing of the case on the merits. Under the provisions of Rule 16 (4) of this Court, the question of jurisdiction will first be discussed. In order that this question may be fully presented, a statement of the case and history of the statutes involved must first be set forth.¹

THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

In addition to the constitutional provisions referred to on pages 2 and 3 of appellants' brief, this case involves the McCarran Act, Act of March 9, 1945, c. 20, Sec. 1, 59 Stat. 33, 15 U. S. C. 1011-1015, and as amended by the Act of July 25, 1947, c. 326, 61 Stat. 448, 15 U. S. C. 1013

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1. Appellee has filed a separate Motion to Dismiss for Lack of Certiorari Jurisdiction, which sets forth the authorities in support thereof and therefore will not be discussed in this brief.

(hereinafter quoted in part), and the following Louisiana Statutes quoted consecutively as exhibits A through G in the appendix of this brief:

Act 253 of 1918, Acts of Louisiana, Regular Session of 1918, p. 461;

Act 55 of 1930, Acts of Louisiana, Regular Session of 1930, p. 122;

Act 211 of 1946, Acts of Louisiana, Regular Session of 1946, p. 640;

Act 195 of 1948, Acts of Louisiana, Regular Session of 1948, Vol. II, p. 141;

Section 655 of Title 22 of Louisiana Revised Statutes, West's L. S. A. Revised Statutes, Vol. 15, p. 565;

Section 983 of Title 22 of Louisiana Revised Statutes, West's L. S. A. Revised Statutes, Vol. 15, p. page 761;

Act 541 of 1950, Acts of Louisiana, Regular Session of 1950, p. 985;

Act 542 of 1950, Acts of Louisiana, Regular Session of 1950, p. 986.

STATEMENT OF THE CASE

Although appellants' statement of the case is essentially correct, they have omitted or misstated certain essential facts. For the purpose of clarifying these matters, appellee now sets out its own statement of the case.

Appellants, citizens of Louisiana, instituted this tort action on April 5, 1952, seeking the recovery of dam-

ages by reason of the alleged injurious effect of using the product known as "Toni Home Permanent", which was purchased at a retail store in Arcadia, Louisiana. This product was manufactured by the Gillette Company of Boston, Massachusetts, and its wholly owned subsidiary, The Toni Company, of Chicago, Illinois. The product, "Toni Home Permanent", was sold by the Gillette Company and its subsidiary throughout the United States, its territories, Canada and Newfoundland, including retail stores in the State of Louisiana, but neither that Company nor its subsidiary were qualified to transact business in the State of Louisiana, nor did they have an agent for service of process there.²

Employers Liability Assurance Corporation, Ltd., appellee, which is a corporation organized under the laws of Great Britain, and has qualified to transact business in the States of Massachusetts, Illinois and Louisiana, is the product's liability insurer of the manufacturer of "Toni Home Permanent", and, as such, it issued and delivered the policy sued on. This insurance contract, an admittedly true copy of which is in the Record at pages 53-67, was executed and issued to the insured, the Toni Company and the Gillette Company, by no Louisiana office of appellee. Admittedly, it was actually applied for and was executed and issued from appellee's office located in Boston, Massachusetts, and was delivered to the Toni Company in Chicago, Illinois. Effective July 1, 1951, to

2. See Paragraph 2 of the supplemental and amended complaint (R. 8) and affidavits of Sheldon Flynn (R. 29-31), and Boone Gross (R. 27-29).

July 1, 1952, the insurance policy is a renewal of the policy sued upon in the companion case, *Bish v. Employers Liability Assurance Corporation, Ltd.*, supra,³ which was effective July 1, 1950, to July 1, 1951.

It is admitted by appellants that, at and from the time of the issuance and delivery of the insurance contract until now, Massachusetts and Illinois had, and have, no statute or law prohibiting or invalidating any of the conditions or limitations found in the contract sued upon. The policy of insurance contains a clause designated as "Action against Company", appearing on page 57 of the Record as No. 12 of the conditions of the policy.⁴ This clause, which will hereafter be referred to as the "no action clause", prohibits suit against the insurer until final judgment shall have been rendered against the in-

3. See Footnote 3 in the opinion of the Court of Appeals (R. 39).

4. **"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.**

"Any person or organization or the legal representative thereof who has secured judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability."

(Italics and emphasis in quotations here and throughout this brief are supplied by appellee unless otherwise specified.)

sured. Admittedly, the clause is valid and enforceable in the States of Massachusetts and Illinois. A direct action against the insurer, prior to the determination of the insured's obligation by judgment or written agreement, is prohibited. Admittedly, appellants have not previously brought suit against the Gillette Company or the Toni Company, and the amount of the insured's obligation if any has not been fixed by judgment or by written agreement.

Appellants' statement, on page 2 of their brief, that the policy extended coverage in Louisiana, is misleading. Clause IV of the Insuring Agreements in the policy (R. 56) provides:

"This policy applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, Canada or Newfoundland. . . ."

The Gillette Company and appellee, the insurer, specifically contracted with reference to Massachusetts laws. Paragraph 18 of the Conditions in the policy (R. 67) provides:

"Terms of this policy which are in conflict with the statutes of the state wherein this policy is *issued* are hereby amended to conform to such statutes."

This action was originally brought against appellee, the insurer, as the sole defendant, without complying with and indeed in direct disregard of the valid conditions in the policy above set out. Originally filed in a State court of Louisiana, the action was removed by appellee to the

District Court of the United States for the Western District of Louisiana, which had recently considered and decided identical issues in the *Bish* case, *supra*. Appellee moved to dismiss the action, contending that the Louisiana Direct Action Statute, relied upon by appellants, did not apply to the facts of this case, or, if applicable, would violate appellee's constitutional rights.⁵ Appellants filed supplemental and amended complaints, seeking to join the Gillette Company as an additional defendant (R. 8-9, 16-18). On September 12, 1952, the District Judge rendered an opinion, dismissing the entire case as to all defendants (R. 32-35). Judgment was signed in accordance with the opinion, dismissing the suit as to all defendants and decreeing "that Acts 541 and 542 of the Louisiana Legislative session of 1950, *insofar as they apply to an insurance company issuing and delivering a policy of public liability insurance outside the State of Louisiana, are unconstitutional, null and void*" (R. 35-36). On September 25, 1952, appellants appealed to the United States Court of Appeals, Fifth Circuit, not only from the judgment rendered in favor of the insurer, but also from the judgment in favor of the Gillette Company (R. 36). Accordingly, both the insurer and the Gillette Company were parties of record in the court below. The Circuit Court rendered an opinion affirming the judgment of the District Court (R. 39), and judgment in accordance therewith was entered, dismissing the action as to both defendants (R. 45). Appellants have not abandoned their claims against the Gillette Company.

5. See appellee's extended motion to dismiss and plea of unconstitutionality (R. 11-14).

HISTORY OF THE LOUISIANA DIRECT ACTION STATUTE IN RELATION TO THE McCARRAN ACT

Prior to 1918, it was clearly recognized in Louisiana that the injured person was a stranger to a contract of liability insurance and had no rights under the policy. Because he was not in privity of contract with the insurer, he could not reach the proceeds of the policy for the payment of his claim by an action directly against the insurer. The insurer was at liberty to settle with and pay its insured any amount they might in good faith agree upon and money paid the insured was not impressed with any trust for the benefit of the injured person; the insured could use such sum as he saw fit.

Act 253 of 1918 of the Louisiana Statutes (Appendix "A" of this brief) provided that in case of insolvency or bankruptcy of the assured, "an action may be maintained *within the terms and limits of the policy* by the injured person or his or her heirs, against the insurer company." Louisiana courts construed the statute to mean that the cause of action "within the terms and limits of the policy" was conditioned upon the injured person's obtaining a judgment against the assured and upon unsuccessful efforts to collect the judgment.*

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6. In 1929, in **Edwards v. Fidelity & Casualty Co. of New York**, 11 La. App. 176, 123 So. 162, the Court said: "Of course, the right to present and enforce this cause of action is conditioned **upon the obtaining of a judgment against the party at fault** and upon unsuccessful efforts to collect that judgment, but these are conditions with which it is within the power of the injured party to comply. If he cannot comply with them, he has only himself to blame."

Act 55 of 1930 of the Louisiana Statutes (Appendix "B" of this brief) was the first statute which provided for a direct action by the injured person against the insurer.⁷ That statute amended and reenacted the 1918 Act to provide that "any *judgment* which may be rendered, against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may *thereafter* be maintained *within the terms and limits of the policy* by the injured person or his or her heirs against the insurer company". It further provided that "the injured person or his or her heirs, at their option, shall have a right of direct action against the insurer company (alone) *within the terms and limits of the policy*. . . . It being the intent of this Act that any action brought hereunder *shall be subject to all of the lawful conditions of the policy contract and defenses which could be urged by the insurer to a direct action brought by the insured*. . . ."

Although the wording of Act 55 of 1930 indicated that the Legislature still intended that the cause of action should be conditioned upon the injured person's obtaining a judgment against the assured, the Louisiana courts disregarded the construction which they had previously plac-

7. In *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So. 2d 875, the Louisiana Supreme Court said: "It is admitted that prior to Act 55 of 1930, a claimant could not maintain a direct action against the assurer but **had to first sue the assured, obtain judgment, and exhaust his remedies prior to bringing his action against the assurer**; such was our law and is now the law of Mississippi."

ed upon the words "within the terms and limits of the policy," and held that the Legislature had created a cause of action in favor of injured persons, which inured to their benefit upon the happening of an accident. It allowed them to institute a direct action at law to recover damages from the insurance company as the sole defendant, despite clear provisions in the insurance contract to the contrary.⁸

The first clause of Act 55 of 1930 provided that "It shall be illegal for any company to issue any policy against liability" except subject to the provisions of the Act, and it would appear that this language would restrict the application of the Act to policies of liability insurance issued in Louisiana. The courts, however, rendered conflicting opinions as to the extraterritorial effect of the statute.⁹

In 1944 this Court, in *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 88 L. Ed. 1440, 64 S.

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8. In *Miller v. Commercial Standard Ins. Co.*, 6 So. 2d 646, 199 La. 575, the Louisiana Supreme Court said:

"Act 55 of 1930 granted to persons injured or damaged by a motor vehicle covered in insurance against liability **a privilege which they did not theretofore have.** It gave them a 'right of direct action against the insurer company alone', to recover such damages as they may have sustained by the fault of the insured."

9. In *Lowery v. Zorn*, 157 So. 826, and *Wheat v. White*, 36 F. Supp. 796, it was held that Act 55 of 1930 could not be applied to policies issued and delivered out of Louisiana.

In *Burke v. Massachusetts Bonding & Ins. Co.*, 19 So. 2d 647, 651, affirmed supra Note 7, it was held that Act 55 of 1930 could not be applied if the accident or injury occurred out of Louisiana.

Ct. 1162, decided that the business of insurance involves interstate commerce. To counteract any adverse effect that this decision might be found to have on State regulation of insurance, Congress enacted the McCarran Act, Act of March 9, 1945, c. 20, Sec. 1, 59 Stat. 33, 15 U.S.C., Sec. 1011-1015, providing in part that the business of insurance "shall be subject to the laws of the *several* states which relate to the regulation or taxation of such business". The House Report on the bill as enacted is decisive of the issues presented in this case:

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, *subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in Allgeyer v. Louisiana (165 U. S. 578), St. Louis Cotton Compress Co. v. Arkansas (260 U. S. 346), and Connecticut General Insurance Co. v. Johnson (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.*" HR Rep No 143, 79th Cong. 1st Sess 3.

In view of this unequivocal expression of congressional meaning, it is evident that Louisiana had (and

now has) no power to regulate in any way contracts of insurance entered into outside its jurisdiction, even if such contracts were entered into by Louisiana citizens or covered risks within the State. The same limitations applied (and now apply) to every other State.

By the Act of July 25, 1947, c. 326, 61 Stat. 448, 15 U.S. C. 1013, Congress suspended the operation of the Sherman and Clayton Acts with reference to insurance and allowed each State until June 30, 1948, to specify the manner in which it would regulate the business of insurance.

By Act 211 of 1946 of the Louisiana Statutes (Appendix "C" of this brief), the Louisiana Legislature, specifically recognizing the suspension of the federal statutes dealing with interstate commerce and the provisions of the McCarran Act, authorized and directed the Secretary of State of Louisiana to draft a comprehensive Insurance Code, to obtain "clarity of purpose" in the laws pertaining to insurance, to be presented to the 1948 session of the Legislature.

The Louisiana Insurance Code was adopted and enacted as Act 195 of 1948 of the Louisiana Statutes. Section 1.02 of that statute declared that "it is the purpose of this Code to regulate that business (insurance) in all its phases". Section 32.01 of the Code specifically repealed Act 253 of 1918 and Act 55 of 1930. Section 14.45 (Appendix "D" of this brief) replaced the previous Direct Action Statute and contained essentially the same provisions as Act 55 of 1930, with the exception that the first clause of the Act provided as follows:

*"No policy or contract of liability insurance shall be issued or delivered in this State. * * *."*

The courts promptly held that, in view of this clear expression of legislative intent, the application of the Direct Action Statute was limited to policies issued or delivered in Louisiana.¹⁰

Effective May 1, 1950, all Louisiana statutes were codified and the Direct Action Statute was re-enacted as Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 (Appendix "E" of this brief), Act 2 of the Extra Session of 1950 of Louisiana Statutes. Section 655 of Title 22 repeated *verbatim* the provisions of Section 14.45 of Act 195 of 1948, including the first clause limiting the application of the act to policies of liability insurance "issued or delivered in Louisiana".

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10. In **Belanger v. Great American Indemnity Co.**, 89 F. Supp. 736, the Court said:

"*** The intention of the legislature to limit Section 14.45, under which the right of direct action against liability insurers is now provided, to policies of insurance issued in Louisiana is manifested by the first clause of the act which reads as follows: 'No policy or contract of liability insurance shall be issued or delivered in this State,***.' By this language it is apparent that the legislature, rather than risk the possibility of Section 14.45 being declared unconstitutional as applied to out of state liability policies, specifically limited its application to policies issued in Louisiana. Under this section therefore, if the expressed intent of the legislature is to be given effect, the direct action provision does not apply to policies of liability insurance issued in states other than Louisiana. It will follow, therefore, that Section 14.45 does not apply to the policy of insurance here in suit since it was admittedly issued in Massachusetts."

Effective July 26, 1950, Act 541 of 1950 of the Louisiana Statutes (Appendix "F" of this brief) amended and *re-enacted* Section 655 of Title 22 of the Revised Statutes of 1950, again repeating *verbatim* the provisions of Section 14.45 of Act 195 of 1948, including the first clause quoted above, but adding the following provision in the body of the Act:

"This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.

Act 542 of 1950 of the Louisiana Statutes (Appendix "G" of this brief) amended Section 983 of Title 22 of the Revised Statutes of 1950 (providing requisites for the issuance of a certificate to do business in Louisiana to a foreign insurer) to include a new subsection requiring the foreign insurer to consent to being sued in a direct action as provided in Section 655 of Title 22.

THE ADMITTEDLY VALID NO ACTION CLAUSE

Appellants' claim to damages cannot relate in the remotest manner to appellee, except by reason of the existence of the insurance contract it issued the Gillette Company in Massachusetts. Being a Massachusetts contract, the law of that state entered into it. The only obligation assumed by appellee in the contract sued upon was the one to indemnify its insured, the Gillette Company, against loss arising by its own negligence. The contract

of insurance was issued for the protection of the insured; it was not designed for the protection of strangers." The existence of the injured person was unknown to the contracting parties. The contract contains an admittedly valid no action clause, hereinabove quoted, which simply provides that no action may be maintained against the insurer until the extent of the insured's loss is fixed by final judgment or by written agreement.

Appellants admit that the no action clause is valid as between the parties to the contract. At the present time, even in Louisiana, a suit on the contract by the insured, the Gillette Company, against appellee could not be maintained, because admittedly no suit has previously been brought against the insured and the amount of the insured's obligation, if any, has not been fixed, either by judgment or by written agreement. An action on the contract admittedly cannot be maintained at the present time.

Appellants assert on pages 3 and 13 of their brief that this is not an action on the contract but is actually a *tort* action. On page 19 of their brief, they state that the insurer can defend the action by pleading that the Gillette Company was free from negligence or that ap-

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11. In **Cushing v. Maryland Casualty Company**, 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. (Advance, page 519, 530), this Court considered a policy of public liability insurance issued in Louisiana to a ship owner, containing a no action clause similar to that in the present case and said:

"The owner's motive in purchasing insurance certainly was not to protect his seamen or the public, but to protect himself against damage claims."

pellants were contributorily negligent in a "full, searching trial where both sides introduce their evidence and assert their legal contentions, which are resolved by the court or jury,"¹² as the case may be". In other words, appellants contend that they are entitled to try their negligence action before a jury with the insurer of the alleged tortfeasor as the sole defendant. Under the express provisions of the valid no action clause and under the laws of Massachusetts, which are part of the contract, appellee cannot legally be put to a defense of appellants' action at this time.

The no action clause is placed in a policy of liability insurance to assist the insurer in avoiding prejudice, questionable liability, and excessive jury verdicts.

In 4 A. L. R. (2d) 761-825, at page 767, an annotation, supported by cases from forty-four of the states, shows that the general rule in the United States is that, in a personal injury action, evidence that the defendant carries insurance protecting him from liability to third persons on account of his negligence is inadmissible. Such evidence is not only inadmissible because it ordinarily is irrelevant as to any of the issues in the case, but because it tends to influence jurors to bring in verdicts against defendants on insufficient evidence and to bring in verdicts for more than they would if they believed that the defendants themselves would be required to pay them. It is well recognized that the usual purpose for which evi-

12. In paragraph 21 of the complaint (R. 15), appellants assert that they are entitled to trial by jury.

dence of this character is presented is to prejudice the jury and obscure the real issues in the case. Juries are notoriously more free with the funds of insurance companies than they are with the funds of ordinary defendants. In the forty-four states referred to, including Massachusetts and Illinois,¹³ evidence concerning the defendant's insurance must be scrupulously kept from the jury. Where such evidence is once injected into the minds of the jury by argument of counsel, or otherwise, the prejudice is sufficient to cause the court to declare a mistrial. Such evidence is recognized, on appeal, as grounds for reversible error.

The court, in *James Stewart & Co. v. Newby*, (C. C.A. 2d), 266 F. 287, said:

"This court must take cognizance of the general recognition among the members of the bar, as well as by the courts, of the harmful effect upon the minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is presented is to prejudice the jury, and the poison is of such character that, once being injected into the mind, it is difficult of eradication. . . . The anecdote of a final instruction to disregard the testimony is ineffective. The removal of the fly does not restore an appetite for the food into which it has fallen . . . Verdicts cannot be relieved of the danger of criticism as long as there is a basis for the opinion that they have been rendered through the influence of prejudice."

13. See the cases from Illinois and Massachusetts cited in 4 A. L. R. (2d) on pages 76² and 769. Further Massachusetts authorities are cited in *Jennings v. Beach*, 1 F. R. D. 442.

In *Brown v. Walter* (CCA 2d) 62 F. 2d 798, 800, Circuit Judge Learned Hand, speaking for the court, said:

"There can be no rational excuse, except the *flimsy* one that a man is more likely to be careless if insured. That is at most the merest guess, much more than outweighed by the probability that the real issues will be obscured."¹⁴ In the case at bar, save for the cross-examination of the doctor, there was no excuse for even an intimation that the defendant was insured; if that witness is not called upon the next trial, there will be none whatever, and unless the insurance is scrupulously kept from the jury, a mistrial should be declared. The prevalent knowledge that in such cases insurance is usually taken is a hard enough handicap at best; it is difficult in any event to get a decision on the real issues."

The Legislature of Michigan, recognizing the prejudicial effect of knowledge of defendant's insurance upon the jury, enacted Act No. 154, Public Acts of 1929, which is the exact opposite of the Louisiana Direct Action Statute, and provided in Section 33 thereof (Comp. Laws Mich. 1929, Sec. 12460) the following:

"In such original action, such insurance company, or other insurer, shall not be made, or joined as a party defendant, nor shall any reference whatever

14. It will be noted that here Judge Hand did not agree with the reasoning of this Court in *Merchants Mut. Auto. Liability Ins. Co. v. Smart*, 267 U.S. 126, 129, 69 L. Ed. 538, 542, 45 S. Ct. 320, wherein it had in mind "the sense of immunity of the owner protected by insurance and the possible danger of a less degree of care due to that immunity."

be made to such an insurance company, or other insurer, or to the question of carrying of such insurance during the course of trial."

The no action clause allows the insurer the benefit of the assured's standing in the community. It also assists the insurer in getting the insured's cooperation. In *Belanger v. Great American Indemnity Co.*, supra (89 F. Supp at page 740), the Court said:

"In a direct action suit against the insurer, the insured is likely to be less interested, less available and less cooperative, particularly when the relationship between the plaintiff and the insured is cordial."

In the final analysis, the no action clause requiring that judgment first be obtained against the assured, is recognized as a reasonable condition precedent in a policy of liability insurance whereby the insurer determines the establishment and amount of its liability under the contract. In *Lorando v. Gethro*, 228 Mass. 131, 117 N. E. 185, 1 A. L. R. 1374, the Massachusetts Supreme Judicial Court, through Chief Justice Rugg, recognized that the injured person could have no rights against the insurer until he had recovered a judgment against the insured, and said:

"It is almost inconceivable that the legislature would attempt to make an insurance company unconditionally liable to pay for a loss without giving it an opportunity to . . . make reasonable conditions as to the establishment of its liability under the insurance contract. * * * A statute of such import

would present a constitutional question quite different from those now at bar."

From the insured's point of view, the no action clause assures that the original negligence action will be filed at the insured's domicile, where it can profit by the good will it has built up in the community and where its expert witnesses are available. In this case, it is alleged that the insured's product was defectively manufactured, an issue which the Gillette Company and the Toni Company deny and are obviously interested in defending. Defense of the issue would require the testimony of the Toni Company's engineers and technicians, readily available at its domicile but who could not be sent throughout the territory covered by the insurance policy without great hardship and inconvenience to the manufacturer. Although the products of these companies are shipped in interstate commerce for sale throughout the United States, its territories, Canada and Newfoundland, that does not render them amenable to suits outside the states of their domicile. Admittedly, they have not qualified to do business in Louisiana and have no agent for service of process there. By purchasing insurance in Massachusetts, they did not intend to subject their products to attack by suits filed in Louisiana against the insurer. The valid no action clause affords that protection.

In addition, the Gillette Company and the Toni Company have a definite interest in holding judgments rendered in favor of injured parties to a minimum. In the policy of liability insurance sued upon herein, the insureds have contracted to pay appellee a "cost-plus"

premium, the details of which are outlined in the endorsement to the policy appearing on pages 63-66 of the Record. It will be noted that this arrangement, unlike that found in many liability policies, contemplates a computation of the premium at six-month intervals throughout the life of the contract, the premium being based upon a defined percentage of the total "incurred losses", being in substance the amounts paid in settlement of claims and judgments by the insurer. The greater the incurred losses, the greater the premium the insureds are obligated to pay. Accordingly, with the insurer, they have a decided interest in avoiding prejudice, questionable liability and excessive jury verdicts.¹⁵

JURISDICTIONAL QUESTION

APPELLEE'S MOTION TO DISMISS THE APPEAL FOR WANT OF JURISDICTION SHOULD BE SUSTAINED BECAUSE THE DECISION OF THE COURT OF APPEALS DID NOT INVALIDATE THE LOUISIANA DIRECT ACTION STATUTE. THE COURT BELOW APPLIED ADMITTEDLY VALID MASSACHUSETTS AND ILLINOIS STATUTES AND JURISPRUDENCE. *Bradford Electric Light Co. v. Clapper*, 284 U. S. 221, 76 L. Ed. 254, 52 S. Ct. 118; *Knop v. Monogahela River Consol. Coal & Coke Co.*, 211 U. S. 485, 53 L. Ed. 294, 29 S. Ct. 188; *Public Service Comm. of Indiana v. Batesville Telegraph Co.*, 284 U. S. 6, 76 L. Ed. 135, 52 S. Ct. 1; *Baxter v. Continental Cas. Co.*, 284 U. S. 578, 76 L. Ed. 502, 52 S. Ct. 2.

The Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. 1254 (2) provides that cases in the Courts of Appeals may be reviewed by this Court "by appeal by

15. The "sense of immunity" of the insured, referred to in *Merchants Mut Auto. Liability Ins. Co. v. Smart*, supra, Footnote 14, is not present here.

a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to "the Constitution, treaties or laws of the United States". Appellee admits that the Louisiana Direct Action Statute, if applied to policies of liability insurance issued or delivered in Louisiana, is valid. The Court of Appeals, Fifth Circuit, has repeatedly recognized the validity of this statute when applied to the Louisiana policies issued by insurance companies.¹⁶ The courts below, in this case and the series of seven companion cases referred to at the outset of this brief, merely held that the Louisiana statute, although valid in its proper field, cannot be applied to a policy of liability insurance issued and delivered outside the State of Louisiana and containing a no action clause, admittedly valid in the states where the policy was issued and delivered. Although this action was filed in Louisiana, the Court of Appeals upheld the validity of the statutes and jurisprudence of Massachusetts and Illinois, where the contract herein sued upon was issued and delivered and where, admittedly, a direct action under the facts of this case is not allowed and the no action clause is valid. The court below, while recognizing the validity of the Louisiana statute as applied to Louisiana policies of lia-

16. See **Elbert v. Lumbermen's Mutual Casualty Co.**, 107 F. Supp. 299, 201 F. 2d 500, rehearing denied, 202 F. 2d 744; Certiorari granted, 98 L. Ed. (Advance, p. 607) presently pending for argument under No. 11 of the October, 1954, Term of this Court; **Cushing v. Maryland Casualty Co.**, 198 F. 2d 536, rehearing denied, 198 F. 2d 1021, Certiorari granted; 345 U. S. 902, 73 S. Ct. 642, 97 L. Ed. 1330, remanded 347 U. S. 409, 74 S. Ct. 608, 98 L. Ed. (Advance, page 519); **Weingartner v. Fidelity Mutual Ins. Co. of Indianapolis**, 205 F. 2d 833.

bility insurance, held that the statute could not be given extra territorial effect or deprive appellee of a defense under the applicable laws of other states, as under the circumstances here presented.

In *Bradford Electric Light Co. v. Clapper*, supra, an action for damages was filed in New Hampshire on a Vermont contract of employment. Although permitted by the New Hampshire statute, the action was barred by the provisions of the Vermont Act, which precluded recovery by proceedings brought in another state for injuries received in the course of employment.¹⁷ The Circuit Court of Appeals held that the action could be maintained because the statute of Vermont could have no extra territorial effect. The defendant appealed and this Court dismissed the appeal for want of jurisdiction. This Court, 284 U. S. 221, 222, 223, 76 L. Ed. 254, 255, 52 S. Ct. 118, said:

17. The *Bradford Electric Light Co. v. Clapper* case supra, was subsequently reviewed by this Court on certiorari and the provisions of the Vermont Act were outlined, 286 U. S. 145, 153, 76 L. Ed. 1026, 1031, 52 S. Ct. 571, as follows:

"It clearly was the purpose of the Vermont Act to preclude any recovery by proceedings brought in another state for injuries received in the course of a Vermont employment. The provisions of the Act leave no room for construction. The statute declares in terms that when a workman is hired within the State, he shall be entitled to compensation thereunder for injuries received **outside, as well as inside, the State**, unless one of the parties elects to reject the provisions of the Act. And it declares further that **for injuries wherever received the remedy under the statute shall exclude all other rights and remedies** of the employee or his personal representatives."

"As the decision of the Circuit Court of Appeals was not against the validity of the statute of Vermont, the appeal to this court must be dismissed for the want of jurisdiction."

In the present case, the action was filed in Louisiana on a Massachusetts contract. Although permitted by the Louisiana statute, the action admittedly is barred in Massachusetts. The Court of Appeals below held that the action cannot be maintained because the Louisiana statute cannot have extra territorial effect under the circumstances. Since the decision of the Court of Appeals is not against the validity of the statute of Louisiana, the appeal to this Court must be dismissed for want of jurisdiction.

Appellants contend that the Court below held that the Louisiana statute is unconstitutional because it stated, in its opinion, that "*if the statute is construed as extending to and invalidating the 'no action' provision of a policy written and delivered, as this one was, outside of the state, the statute represents an attempt to give extra territorial effect to Louisiana laws and to subject to them the doing of business, and the business done, in other states. So construed, we are in no doubt that . . . it violates the defendant's constitutional rights*". (R. 42). It is the contention of appellee that the Court of Appeals, in making this statement, actually construed the Louisiana statute to uphold its validity, not to invalidate it. It refused to give the statute a construction whereby it would have extra territorial effect and thereby violate appellee's constitutional rights. It is well settled that the mere con-

struction of a state statute does not of itself present a Federal question or permit a direct appeal from a Court of Appeals to this Court. *Knop v. Monongahela River Consol. Coal & Coke Co.*, *supra*.

Appellee, in its motion to dismiss, contended that the Louisiana statutes, under which this proceeding was brought, "do not apply under the facts of this case, or if applicable, violate the provisions of the Federal and Louisiana Constitutions * * *". (R. 11-14). The Court below merely upheld appellee's contention that the Louisiana Direct Action Statute is inapplicable under the circumstances of this case. Section 1254 (2) allows an appeal to this Court in only one instance: Where the Court of Appeals holds a state statute invalid. A mere application of state law is insufficient. *Public Service Comm. of Indiana v. Batesville Telegraph Co.*, *supra*; *Baxter v. Continental Cas. Co.*, *supra*.

The cases referred to in appellants' brief are not relevant to the facts presented here. The case of *Dahnke-Walker Co. v. Bondurant*, cited on page 16 of appellants' brief, discusses the right of review by writ of error, a remedy which has been abolished since the opinion was rendered. The case of *Furst v. Brewster*, cited on the same page, deals with the right of appeal from a judgment of a State Supreme Court and is inapplicable here.

Appellants contend that the decision of the Court of Appeals invalidated a provision inserted in the Direct Action Statute by Act 541 of 1950, and, accordingly, the Court necessarily held that the statute was unconstitutional. Appellee shall now show that this contention is not sound.

THE INVALIDITY OF AN EXCEPTION OR PROVISIO, INSERTED IN THE BODY OF AN ORIGINAL ACT AND REENACTED BY AN AMENDING ACT, DOES NOT MAKE THE ORIGINAL ACT INVALID, WHERE THE TWO ACTS WERE ENACTED BY DIFFERENT LEGISLATURES. THE UNCONSTITUTIONAL PROVISIO UNDER SUCH CIRCUMSTANCES IS IN REALITY NO LAW AND IN LEGAL CONTEMPLATION IS AS INOPERATIVE AS IF IT HAD NEVER BEEN PASSED. *Frost v. Corporation Commission*, 278 U. S. 515, 528; 73 L. Ed. 483, 491; 49 S. Ct. 235; *Eberle v. Michigan*, 232 U. S. 700, 705; 58 L. Ed. 803, 805; 34 S. Ct. 464; *Reitz v. Mealey*, 314 U. S. 33, 39; 85 L. Ed. 21, 25-26; 62 S. Ct. 24; *Traux v. Corrigan*, 257 U. S. 312; 66 L. Ed. 254; 42 S. Ct. 124; *Davis v. Wallace*, 257 U. S. 478, 66 L. Ed. 325; 42 S. Ct. 164; *City of New Orleans v. Levy*, 223 La. 14; 64 So. 2d 798, 802 (1953).

Following the passage of the McCarran Act, as hereinabove pointed out in the History of the Direct Action Statute, the Louisiana Legislature provided specifically that the direct action statute should apply only to policies of liability insurance "issued or delivered in this State." Thereafter, a subsequent Legislature reenacted the direct action statute in full, adding a proviso in the body of the Act that the right of direct action should exist "whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contained a provision forbidding such direct action".

It is well settled that an unconstitutional proviso, enacted by a subsequent legislature, is no law and the validity of the reenacted statute is not affected thereby. In *Frost v. Corporation Commission*, supra, this Court said:

"Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, *is a nullity and, therefore, powerless to work any change in the existing statute*, that statute must stand as the only valid expression of the legislative intent.

"* * * The question is not affected by the fact that *the amendment was accomplished by inserting the proviso in the body of the original section and re-enacting the whole at length.*

"But here the proviso under attack, having been adopted by a subsequent act and being invalid, had no effect, as we have already said upon the provisions of the statute. As applied to this case, it *began and ended as a futile attempt by the legislature to bring about a change in the law which a previous legislature had enacted. For this purpose, and as construed, and applied below, it was a nullity, wholly 'without force or vitality', leaving the provisions of the existing statute unchanged.*"

In *Eberle v Michigan*, supra, this Court said:

"In the case at bar the original local option law of 1889 had been held to be constitutional as a whole, and its validity could not be impaired by the subsequent adoption of what were in form amendments, but, in legal effect, *were mere nullities.*"

See also *Reitz v. Mealy*, supra; *Traux v. Corrigan*, supra; and *Davis v. Wallace*, supra.

In *City of New Orleans v. Levy*, *supra*, the Louisiana Supreme Court said:

"This court and the courts of other jurisdictions have uniformly held that an unconstitutional exception which would have invalidated a statute or ordinance had it been contained therein originally does not have the same effect *when added by an amendment years later*, notwithstanding that on the adoption of the amendment the original legislation is *re-enacted at length*. *The unconstitutional amending statute or ordinance is in reality no law, and in legal contemplation is as inoperative as if it had never been passed.*"

The judgment of the District Court below dismissed the case as to all defendants and also declared the re-enacted statute unconstitutional *only insofar as it applied to an insurance company issuing and delivering a policy of public liability insurance outside the State of Louisiana* (R 35-36). The judgment of the Court of Appeals below merely affirmed the judgment of dismissal (R. 45). If it be considered that the Court of Appeals did hold that the proviso, added by subsequent legislation, was invalid, that still would not affect the validity of the original Louisiana direct action statute. The unconstitutional proviso under the circumstances was no law and, in legal effect, a mere nullity.

THE CASE SHOULD NOT BE REVIEWED ON APPEAL IN FRAGMENTS OR PIECEMEAL. *Metropolitan Trust Co. of City of New York, in re*, 218 U. S. 312, 320, 54 L. Ed. 1051, 1054, 31 S. Ct. 18; *Wilson v. Kiesel*, 164 U. S. 248, 251, 41 L. Ed. 422, 423, 17 S. Ct. 124; *Hartford Accident & Indemnity Co. v. Bunn*, 285 U. S. 169, 76 L. Ed. 685, 52 S. Ct. 354; *Collins v. Miller*, 252 U. S. 364, 64 L. Ed. 616, 40 S. Ct. 347; *Arnold v. United States*, 263 U. S. 427, 68 L. Ed. 371, 44 S. Ct. 144; *Martinez v. International Banking Corp.*, 220 U. S. 214, 55 L. Ed. 438, 31 S. Ct. 408.

The Gillette Company was a party of record in the Court of Appeals and the judgment of that Court, dismissing this case as to *all* defendants, was in its favor as well as in favor of appellee, Gillette's insurer. (R. 45 affirming judgment of the District Court, R. 35, 36). On page 5 of their brief, appellants state that "Mrs. Ruth S. Watson suffered severe personal injuries as the result of the use of a patented hair waving product, known as a 'Toni Home Permanent', a product manufactured by Gillette . . . due to harmful ingredients therein". Appellants state that this is a tort action and their cause of action admittedly is based upon the asserted negligence, if any, of the Gillette Company. Obviously the Gillette Company, which desires to defend this attack upon its product and which is insured under a contract providing for a "cost-plus" premium, is directly and vitally interested in maintaining the judgment appealed from, not only insofar as the judgment below is in its favor, but also is in favor of its insurer. It is well settled that a case should not be brought up by appeal in fragments or piecemeal. *Metro-*

politan Trust Co. of City of New York, In Re, supra; Wilson v. Kiesel, supra; Hartford Accident & Indemnity Co. v. Bunn, supra; Collins v. Miller, supra; Arnold v. United States, supra, and Martinez v. International Banking Corp., supra.

CONCLUSION OF ARGUMENT ON JURISDICTIONAL QUESTION

The Court of Appeals did not hold that the Louisiana direct action statute is invalid but sustained the validity of Massachusetts and Illinois statutes and decisions which apply under the circumstances of this case. The Court below merely stated that a proviso, added to the Louisiana statute by a subsequent legislature, if construed to be applicable to the facts of this case, would deprive appellee of its constitutional rights. That statement does not support a direct appeal from a Court of Appeals to this Court. In the alternative, if it be considered that the Court of Appeals held that the proviso in the Louisiana Act is unconstitutional, the situation is not altered because, under the circumstances, the proviso was a mere nullity and the validity of the State statute itself is not affected. The Gillette Company, in whose favor the judgment below was also rendered, is an interested party to this appeal and the case should not be considered on appeal in fragments. Appellee's motion to dismiss the appeal should be sustained.

QUESTIONS PRESENTED FOR REVIEW ON THE MERITS

Does Louisiana have the right to invalidate a provision of a contract executed in Massachusetts and to be performed in Massachusetts and Illinois, which provision is admittedly valid in those states? Has Louisiana taken hold of a matter within her power, or has she reached beyond her borders to regulate a subject which is none of her concern because the Constitution and Congress have placed control elsewhere? ¹⁸

ARGUMENT ON THE MERITS

ALTHOUGH A STATE MAY REGULATE THE ACTIVITIES OF FOREIGN CORPORATIONS WITHIN THE STATE, SHE CANNOT REGULATE OR INTERFERE WITH WHAT THEY DO OUTSIDE. A STATE CANNOT REGULATE OR INVALIDATE PROVISIONS IN AN INSURANCE CONTRACT VALIDLY MADE OUTSIDE HER BORDERS. *Allgeyer v. State of Louisiana*, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. Ed. 297, 43 S. Ct. 125; *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436; *The McCarran Act*; *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 90 L. Ed. 1342, 66 S. Ct. 1142.

This case involves the validity of the provisions of a contract of insurance which, it is conceded, was made outside and beyond the jurisdiction of the State of Louisiana. The Gillette Company, which has its home office in

18. See *Osborn v. Ozlin*, 310 U. S. 53, 62; 84 L. Ed. 1074, 1078, 60 S. Ct. 758.

Massachusetts, and its subsidiary, The Toni Company, which is domiciled in Illinois, purchased the contract of liability insurance to indemnify themselves against any amounts they may be "legally obligated to pay" by reason of their negligence, if any. Although the contract provides coverage throughout a wide territory, it contains a valid no action clause which provides that negligence actions must be filed against the insureds; the third party claimants have no right to proceed against the insurer until judgments are first obtained against the insureds. Obviously, the contract did not contemplate performance in Louisiana, because the insureds are not domiciled there, have not been qualified to do business there and have no agent for service of process there.

The contract was executed and issued by the Massachusetts office of the insurance company, appellee, and was delivered to the Toni Company in Illinois. As stated previously, the contracting parties specifically declared that the contract would be governed by the laws of the State of Massachusetts, where it was issued. The "cost-plus" premium was to be paid and losses, if any, adjusted at six-month intervals in Massachusetts. Although appellee happened to be doing other business in Louisiana, the contract herein sued upon is obviously not part of its Louisiana business. At the time the contract was entered into, Louisiana had no interest in the risk covered.

The no action clause, admittedly valid in Massachusetts and Illinois, goes to the obligation of the contract and cannot be subsequently invalidated in Louisiana. Whereas Louisiana admittedly has the power to regulate

the Louisiana business of insurance companies, it has no power to regulate or invalidate insurance contracts entered into in other states, valid where made. This is particularly true of the present case, where none of the parties to the contract are citizens of Louisiana, performance there is not contemplated, and the risk, being for indemnity conditioned upon a final judgment against the insureds, is not located there. Louisiana's connection with this contract is slight.

In *Allgeyer v. State of Louisiana*, supra, this Court upheld the right of a citizen of Louisiana to enter into a contract outside the State of Louisiana for insurance on his property, even though the property was temporarily located in Louisiana. This Court said:

"We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted. * * * We are not dealing with the contract. If it be legal in New York, it is valid elsewhere. * * * It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was property temporarily within the state."

In *St. Louis Cotton Compress Co. v. Arkansas*, supra, this Court said:

"It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

In *Connecticut General Life Insurance Company v. Johnson*, *supra*, this Court said:

"The due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."

In *New York Life Insurance Company v. Head*, 234 U. S. 149, 161, 58 L. Ed. 1259, 1264, 34 S. Ct. 879, this Court said:

"It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the State of New York, and there destroy freedom of contract without drawing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends."

In *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 69 L. Ed. 342, 45 S. Ct. 129, this Court held that in the absence of an express stipulation in the contract, state statutes relating to insurance do not affect the validity of a policy issued by the insurer in another state.

In 1944, when this Court, in *United States v. South-Eastern Underwriters Association*, *supra*, held that the business of insurance involves interstate commerce, Congress promptly took steps to insure the continued regulation of insurance by the states (see previous history of Louisiana direct action statute in relation to the McCarran Act). The McCarran Act was passed in 1945, providing that the business of insurance "shall be subject to the laws of the several states which relate to the regulation or tax-

ation of such business." In enacting this Act, Congress did not intend to clothe the states with any power to regulate the business of insurance beyond that which they previously possessed. Congress was fully aware of the limitations placed upon the power of states to regulate insurance contracts entered into outside their borders and intended that the same limitations would continue. The House Report on the Bill as enacted provides as follows:

"Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, *subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance in Allgeyer v. Louisiana (165 U. S. 578), St. Louis Cotton Compress Co. v. Arkansas (260 U. S. 346), and Connecticut General Insurance Co. v. Johnson (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or re-insurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.*"

(H. R. Rep. No. 143, 79th Congress, First Session, 3, 1945).

This unequivocal expression of congressional meaning, as stated, is decisive of the issues presented in this case. Congress did not provide that the business of insurance in the United States shall be subject to the laws of the State of Louisiana, but provided that each state has the power to regulate the business of insurance within its jurisdiction.

This Court in *Prudential Insurance Company v. Benjamin*, supra, outlined the history of the jurisprudence leading up to its decision in the *South-Eastern Underwriters* case, the McCarran Act, and jurisprudence thereafter, and stated (328 U. S. 408, 416, 90 L. Ed. 1342, 1353, 66 S. Ct. 1142) :

"Due process in its jurisdictional aspects remained to confine the reach of state power in relation to business affecting other states."

Accordingly, it is clear that Louisiana has no power to regulate contracts of insurance entered into outside its jurisdiction, even if such contracts are entered into by Louisiana citizens or cover risks within the State. The contract here involved was not entered into by a Louisiana citizen and, as we have demonstrated, did not cover risks within the State. Louisiana has no power to regulate the contract of insurance involved because the Constitution and Congress, in enacting the McCarran Act, have placed control elsewhere.

APPLICATION OF THE LOUISIANA DIRECT ACTION STATUTE TO ABROGATE THE NO ACTION CLAUSE IN THE INSURANCE CONTRACT HERE INVOLVED, WHICH IS ADMITTEDLY VALID WHERE THE CONTRACT WAS MADE AND DELIVERED, WOULD DEPRIVE APPELLEE OF PROPERTY WITHOUT DUE PROCESS OF LAW, IMPAIR THE OBLIGATION OF THE CONTRACT, DENY EQUAL PROTECTION OF THE LAWS AND FAIL TO GIVE FULL FAITH AND CREDIT TO THE STATUTES AND JURISPRUDENCE OF OTHER STATES, CONTRARY TO THE CONSTITUTION OF THE UNITED STATES. *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178, 54 S. Ct. 634; *Lauritzen v. Larsen*, 345 U. S. 571, 97 L. Ed. 1254, 73 S. Ct. 921; *Home Insurance Co. v. Dick*, 281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338; *Boseman v Connecticut General Life Ins. Co.*, 301 U. S. 196, 81 L. Ed. 1036, 57 S. Ct. 686; *Pritchard v. Norton* 106 U. S. 124, 27 L. Ed. 104, 1 S. Ct. 102.

The contract in the present case, issued in Massachusetts, did not obligate the indemnitor, or insurer, to pay even the insured merely on proof of damage or injury to someone else. It was conditioned upon any such claimed liability first being liquidated and determined between the insured and any third person who might assert it. It is admitted that this condition is binding upon the insured and, accordingly, it should be equally as binding upon third persons who are not even parties to the contract. It has been shown that, in forty-four states covered by the policy, the mere mention of insurance in a negligence action constitutes reversible error and an action may not be instituted against the insurer in the first instance. The condition requiring final judgment against the insured, before the insurance company is obligated, is

valid and enforceable. On the other hand appellants contend that the Louisiana direct action statute invalidates the no action clause and that the injured person may file suit against the insurer direct, without ever having brought suit or obtained a judgment against the insured. Appellee's obligation under its contract cannot be varied or enlarged to that extent. The Louisiana statute, if construed to have the effect contended by appellants, would deprive appellee of substantial and valuable rights. The policy in this case is a Massachusetts contract and the law of that state entered into it and became a part of it, not only by operation of law but by express agreement of the parties. Louisiana cannot make it a different and more onerous one than the contract entered into outside her borders.

In the case of *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, supra, a contract of fidelity insurance was valid in Tennessee, where made and intended to apply, but its nature and terms were such that it covered the risk in any other state, if the business of the insured, as actually happened, was carried on there. The promise of the insurer ripened into an obligation in Mississippi through the dishonesty of an employee there. The contract provided that any claim thereunder must be made upon the defendant within fifteen months after the termination of the suretyship for the defaulting employee. This condition was valid in Tennessee, but was in violation of the statutes in Mississippi, where the suit was brought. In upholding the insurer's defense under the provisions of the Tennessee contract, this Court said:

"The Mississippi statutes, so construed, deprived the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (*Hooper v. California*, 155 U.S. 648, 15 S. Ct. 207, 39 L. Ed. 197; *Orient Insurance Co. v. Daggs*, 172 U.S. 557, 555, 566, 19 S. Ct. 281, 43 L. Ed. 552; *New York Life Ins. Co. v. Cravens*, 178 U.S. 389, 398-399, 20 S. Ct. 962, 44 L. Ed. 1116); *but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.* 34 S. Ct. 879, 58 L. Ed. 1259; (*New York Life Ins. Co. v. Head*, 234 U.S. 149; *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 399, 45 S. Ct. 129, 69 L. Ed. 342.) *Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.* *Home Insurance Co. v. Dick*, 281 U.S. 397, 407-408, 30 S. Ct. 338, 74 L. Ed. 926.

"It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond, to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events, loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is

true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in the state, could Mississippi without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Co. v. Dick*, supra, page 408, of 281 U. S., 50 S. Ct. 338, 74 L. Ed. 926), *it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Aetna Life Ins. Co. v. Dunken*, supra; *Home Insurance Co. v. Dick*, supra. Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare *Bond v. Hume*, 243 U. S. 15, 22, 37 S. Ct. 366, 61 L. Ed. 565. But clearly this is not such a case." (292 U. S. 143, 54 S. Ct. 636).

The foregoing decision by this Court is considered to be closely analogous to the facts and decisive of the constitutional issues presented in the present case. There was no intention to violate any law when the contract was entered into in Boston, Massachusetts. The contracting parties acted in good faith and intended that the contract should be governed by the laws of Massachusetts. The presumption is that they intended to contract with reference to the law of the state in which the contract would be valid, not with reference to the law of Louisiana, which would invalidate a substantial portion thereof. In fact, they clearly evidenced an intention that the contract should be governed by the laws of the State of Massachusetts by providing that terms of the policy should conform to the laws of the state in which the policy was issued. In *Pritchard v. Norton*, supra, this Court held that it must be presumed that parties to a contract contemplated a law according to which their contract would be upheld, rather than one by which it would be defeated. This Court said (106 U. S. 124, 136, 27 L. Ed. 104, 108, 1 S. Ct. 102):

"The parties cannot be presumed to have contemplated a law which would defeat their engagements."

In *Boseman v. Connecticut General Life Ins. Co.*, supra, this Court said (301 U. S. 196, 202, 81 L. Ed. 1036, 1039, 1040, 57 S. Ct. 686):

"The oil corporation (insured) and respondent (insurer) intended, and the policy definitely declares, that Pennsylvania law should govern. Undoubtedly, as between employer and insurer, Pennsylvania law controls. In every forum a contract is governed

by the law with a view to which it was made. But the precise issue for decision is whether, as between petitioner and insurer, the policy provision requiring notice of claim is governed by Pennsylvania law or Texas law. * * *

"The conclusion that Pennsylvania law governs the policy provision requiring notice of claim is supported not only by the *making and delivery of the contract of insurance in that state, the declaration in the policy that Pennsylvania law shall govern* and petitioners' acceptance of the insurance according to the terms of the policy but also by *the purpose of the parties to the contract that everywhere it shall have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided.*"

In *Lauritzen v. Larsen*, supra, this Court said (345 U. S. 571, 590-592, 97 L. Ed. 1254, 1272, 73 S. Ct. 921) :

"We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state. *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 78 L. Ed. 1178, 54 S. Ct. 634, 92 A. L. R. 928; *Home Ins. Co. v. Dick*, 281 U. S. 397, 74 L. Ed. 926, 50 S. Ct. 338, 74 A. L. R. 701. *The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way regardless of the fortuitous circumstances which often determine the forum.* * * *"

"Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argu-

ment for imposing the law of the forum upon whose who do not."

Compare: *Home Insurance Company v. Dick*, supra. *Bradford Electric Light Co. v. Clapper*, supra; *Modern Woodmen of America v. Mixer*, 267 U. S. 544, 550, 69 L. Ed. 783, 785, 45 S. Ct. 389; *Order of United Commercial Travelers of America v. Wolfe*, 331 U. S. 586, 91 L. Ed. 1687, 67 S. Ct. 1355, and *Hughes v. Fetter*, 341 U. S. 609, 95 L. Ed. 1212, 71 S. Ct. 980.

The foregoing authorities and the cases cited therein hold that Louisiana must give full faith and credit to the statutes and jurisprudence of Massachusetts and Illinois, and that to apply the Louisiana direct action statute under the circumstances here presented would deprive appellee of property without due process of law and deny equal protection of the laws. The obligation of the contract herein sued upon is obviously impaired if the Louisiana statute is applied to invalidate a substantial portion thereof. The guaranty of the Contract Clause to the Federal Constitution relates not to the date of the enactment of a statute, but to the date of its effect on contracts. When issued, the contract was not subject to Louisiana law. Act 541 of 1950, as above demonstrated, does not purport to regulate the provisions of contracts of liability insurance entered into outside the State of Louisiana. The first clause of the Act still restricts its application to those policies of liability insurance "issued and delivered in Louisiana". The proviso added to the direct action statute by Act 541 of 1950 does not recognize a right of

direct action on a policy issued outside the State until the occurrence of an accident or injury within the State of Louisiana.¹⁹

It is clear that the direct action statute did not purport to operate upon the contract until the happening of the accident and the bringing of the present action in the Louisiana courts. Hence, the statute violates the contract clause. See *Home Insurance Company v. Dick*, supra, (281 U. S. 397, 411, 74 L. Ed. 926, 935, 50 S. Ct. 338).

The policy of insurance sued upon herein was effective from July 1, 1951 to July 1, 1952, but, as above demonstrated, was a renewal of the policy involved in the case of *Bish v. Employers Liability Assurance Corporation, Ltd.*, supra, which was effective July 1, 1950 to July 1, 1951. The endorsement to the policy herein sued upon shows that the "cost-plus" premium is computed at six-month intervals until June 30, 1955 (R. 64). Act 541 of 1950 became effective July 26, 1950, and the courts below in the *Bish* case held that the statute, if construed to apply, violated the obligations of the contract. By the same token, the obligations of the same contract, renewed and now under consideration, were violated.

19. In *West v. Monroe Bakery*, 217 La. 189, 46 So. (2d) 122, the Louisiana Supreme Court said:

"An analysis of our jurisprudence considered by the appellate court in reaching its conclusion discloses that with two exceptions, Act 55 of 1930 has been treated consistently as conferring **substantive rights** on third parties to contracts of public liability insurance, **which become vested at the moment of the accident in which they are injured. . . .**"

SINCE THE PROVISIONS OF LOUISIANA ACT 541 OF 1950, IF APPLIED TO A POLICY ISSUED AND DELIVERED OUTSIDE THE STATE OF LOUISIANA, ARE UNCONSTITUTIONAL, LOUISIANA ACT 542 OF 1950, REQUIRING THE "CONSENT TO BE SUED", IS EQUALLY UNCONSTITUTIONAL. *Frost v. Railroad Commission of California*, 271 U. S. 583, 70 L. Ed. 1101, 46 S. Ct. 605; *Connecticut General Life Ins. Co. v. Johnson*, *supra*; *Hanover Fire Insurance Co. v. Carr*, 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179; *Home Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365, 87 U. S. 445; *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678.

On page 22 of their brief, appellants make the following statement:

"Obviously, if Act 541 is constitutional, i.e., if the Legislature had the power to say: 'this right of action shall exist whether the policy of insurance sued upon was written and delivered in the State of Louisiana or not' then it had the additional power to require foreign insurance companies to agree to put themselves on the same basis as Louisiana companies. Conversely, *it is also obvious that if the Legislature lacked the power to enact the quoted words, then it lacked the power to force a foreign insurance company to sign the consent agreement.*

"Since Act 542 will either stand or fall with Act 541 it would serve no useful purpose to discuss it further."

Appellee agrees that the above statement disposes of any additional issues as to the validity of the Louisiana direct action statute. Clearly, since the provision in

Louisiana Act 541 of 1950, extending the right of direct action to policies issued and delivered outside of Louisiana, is unconstitutional, Act 542 of 1950, forcing a foreign insurance company to consent to such action, is equally unconstitutional. In *Frost v. Railroad Commission of California*, supra, this Court said:

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold."

In *Connecticut General Life Ins. Co. v. Johnson*, supra, this Court said (303 U. S. 77, 79, 80, 82 L. Ed. 673, 677, 58 S. Ct. 436):

*"No contention is made that appellant has consented to the tax imposed as a condition of the granted privilege to do business within the State. Nor could it be. * * * A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law."*

It is well settled that the admission of foreign corporations into a state may not be conditioned upon the surrender of Constitutional rights. A statute requiring a corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution and laws

of the United States, is unconstitutional and void. One cannot by acquiescence make valid that which is void. *Home Ins. Co. of New York v. Morse*, supra; *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 400, 72 L. Ed. 927, 929, 48 S. Ct. 553; *Terral v. Burke Constr. Co.*, 257 U. S. 529, 66 L. Ed. 352, 42 S. Ct. 188; *Hanover Fire Ins. Co. v. Carr*, supra; *Frost v. Railroad Commission of California*, supra; *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 S. Ct. 619; *Power Manufacturing Co. v. Saunders*, supra; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623, 45 S. Ct. 324; *Lafayette Insurance Co. v. French*, 59 U. S. 404, 18 How. 404, 15 L. Ed. 451; *Barron v. Burnside*, 121 U. S. 186, 30 L. Ed. 915, 7 S. Ct. 931; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 207, 36 L. Ed. 942, 945, 13 S. Ct. 44; *Connecticut General Life Ins. Co. v. Johnson*, supra; *Williams v. Standard Oil Co. of La.*, 278 U. S. 235, 241, 73 L. Ed. 287, 49 S. Ct. 115; *State of Washington ex rel. Bond & Goodwin & Tucker v. Superior*, 289 U. S. 361, 77 L. Ed. 1256, 1260, 53 S. Ct. 624; *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629, 80 L. Ed. 943, 56 S. Ct. 611; *Schwegmann Bros. v. La. Board*, 216 La. 148, 43 So. (2d) 248.

ANSWER TO APPELLANTS' BRIEF

THIS COURT IS NOT BOUND BY THE DECISIONS OF LOUISIANA STATE COURTS RELATING TO THE ISSUES HERE PRESENTED.

Appellants contend that the Louisiana Direct Action Statute, in granting the injured person a right of action which would not otherwise exist, is purely proced-

ural and contains nothing substantive, and accordingly, the case must be governed by Louisiana law. They further contend that this Court is bound by Louisiana's conflict-of-laws decisions. Their argument is not sound. This case raises questions as to whether the Louisiana statute violates the Federal Constitution and raises Federal questions of substance, which must be determined by decisions of this Court and appellate courts of the United States. The Federal claim may not be disposed of by saying that the statute is purely procedural.

It is true that under *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, Courts of the United States are bound to follow the decisions of the courts of last resort of the States in cases wherein jurisdiction is based on diversity of citizenship. However, where a defense is made, based on the Laws or Constitution of the United States, this Court determines the issues for itself.

The Rules of Decision Act, 28 U. S. C., Section 1652, provides as follows:

"The laws of the several states, *except where the Constitution or Treaties of the United States or Acts of Congress otherwise require or provide*, shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply."

The Act itself plainly states that Federal courts are not to be bound by the decisions of a state court where the constitutionality of a state statute is involved. A state may be limited in its conflict of laws rules by pro-

visions of the Federal Constitution. It follows of necessity that Federal Courts are not bound by local rules of conflict of laws or policy where the application of such rules will result in a violation of the Constitution or Federal law.

In *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, this Court said that:

"Subject only to review on any Federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law."

It is well settled that a Federal court is not bound to follow a local rule of conflict of laws where the application of such rule would violate the Federal Constitution. *Irving Trust Co. v. Day*, 314 U. S. 556, 561, 86 L. Ed. 452, 457, 62 S. Ct. 398; *Sampson v. Channell*, 110 F. (2d) 754, certiorari denied, 310 U. S. 650, 84 L. Ed. 1415, 60 S. Ct. 1099; *Clark v. Order of United Commercial Travelers*, 177 F. (2d) 467, certiorari denied, 399 U. S. 922, 94 L. Ed. 1345, 70 S. Ct. 610.

In *Home Insurance Co. v. Dick*, supra (281 U. S. 397, 407, 74 L. Ed. 926, 933, 50 S. Ct. 338), this Court said:

"The objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constitution, raises Federal questions of substance, and the existence of the Federal claim is not disposed of by saying that the statute, or the one year provision in the policy, relates to the remedy and not to the substance."

**THE LOUISIANA DIRECT ACTION STATUTE
IS NOT PURELY PROCEDURAL**

Appellants try to avoid the issues here raised by saying that the Louisiana statute, in granting the injured person a right of action which would not otherwise exist, is purely procedural and contains nothing substantive, and accordingly, this case must be governed by Louisiana law. Their argument is not sound. Since this case raises a question as to whether the State statute violates the Federal Constitution or laws, the Federal claim may not be disposed of by saying the statute is purely procedural.

It is clear that any statute which creates a right of action, gives rise to a cause of action, or which confers upon a party in the first instance the right to bring suit, is substantive law.²⁰ A remedy alone is meaningless and cannot exist without a right or cause of action to enforce. Before the passage of the direct action statute, as above set forth, it was clearly recognized in Louisiana that the injured person was a stranger to a contract of liability insurance and had no rights under the policy. The statute gave him a privilege which he did not theretofore have; it created a right of direct action against the insurer alone.

Clearly, the Louisiana statute is not purely procedural but conferred upon the injured party a substantive right of direct action against the insurer, and the Louisiana courts have so held. The opinion of the Dis-

20. *State v. Elmore*, 177 La. 1057, 155 So. 896; *Matney v. Blue Ribbon*, 12 So. (2d) 249, affirmed 202 La. 505, 12 So. (2d) 253.

strict Court below was rendered on September 12, 1952 (R. 32) and the judgment appealed from was entered on September 29, 1952 (R. 35-36). At that time, the jurisprudence was firmly established in Louisiana that the direct action statute was not purely procedural but conferred substantive rights upon the injured person. In each of the seven companion cases referred to at the outset of this brief, the Federal courts in Louisiana have held that the Louisiana statute is substantive and not purely procedural. In *New Amsterdam Casualty Co. v. Soileau*, 167 F. (2d) 767, decided in May of 1948, the Court of Appeals, Fifth Circuit, said:

"The 1930 Act is not wholly procedural, for it confers also a *substantive right* upon the injured party in the direct action granted such party against the insurer."

The latest expression on the subject by Louisiana State courts was found in the case of *West v. Monroe Bakery*, 217 La. 189, 46 So. (2d) 122, decided March 20, 1950; rehearing denied April 24, 1950, wherein the Louisiana Supreme Court said:

"An analysis of our jurisprudence considered by the appellate court in reaching its conclusion discloses that with two exceptions Act 55 of 1930 has been treated consistently as conferring *substantive rights* on third parties to contracts of public liability insurance, which become vested at the moment of the accident in which they are injured. . . ." (Italics by the Court).

Despite the foregoing decision by the Louisiana Supreme Court, with emphasis placed upon the words "substantive rights" by that Court itself, and the decisions of the Federal Courts referred to, appellants assert on pages 8, 9, 12 and 25 of their brief that Louisiana courts have "consistently" and "without exception" held that the direct action statute is purely procedural and contains nothing substantive. They are not correct. Appellants apparently rely heavily upon a decision of the Louisiana Supreme Court in *Home Indemnity Co. v. Highway Ins. Underwriters*, 222 La. 540, 62 So. (2d) 828, wherein the Court, without even referring to its previous holding in the *West v. Monroe Bakery* case, supra, declared that the direct action statute is remedial legislation and that "subrogation is recognized as substantive law". That decision was rendered on December 15, 1952, and rehearing was denied January 12, 1953, both *after* the opinion and judgment of the District Court below in this case. It is well settled that a decision of the highest court of a state, construing a state statute otherwise than it had been *previously* construed by a Federal Court, does not make the judgment of the Federal Court erroneous.

In *Concordia Ins. Co. v. School District*, 282 U. S. 545, 552, 553, 75 L. Ed. 528, 542, 543, 51 S. Ct. 275, this Court said:

"But that inquiry may be put aside since the decision (of the state court) was handed down on April 8, 1930, more than a year after the present judgment had been entered by the Federal District Court, and whatever may be the prospective effect of this last decision, it cannot be given a retroactive effect in

respect of the judgment of the Federal District Court so as to 'make that erroneous which was not so when the judgment of that court was given'. *Morgan v. Curtenius*, 4 How. 1, 3; 15 L. Ed. 823, 824; *Pease v. Peck*, 18 How. 595, 598, 15 L. Ed. 518, 520; *Roberts v. Bolles*, 101 U. S. 119, 128, 125, 25 L. Ed. 880, 884; *Burgess v. Seligman*, 107 U. S. 20, 35, 27 L. Ed. 359, 365, 28 S. Ct. 10; *Edward Hines Yellow Pines Trustees v. Martin*, 268 U. S. 458, 69 L. Ed. 1050, 45 S. Ct. 543; *Fleischman Co. v. Murray*, (C.C.), 161 Fed. 162."

The foregoing decision of this Court also recognizes that where it cannot be said that the highest court of a state has definitely so construed a state statute as to settle a question under it, a Federal Court having such question is free to construe the statute for itself. The construction of the statute by the courts below in this and the seven companion cases referred to at the outset of this brief, that the statute confers a substantive right of action upon the injured party, is correct.

THE LOUISIANA DIRECT ACTION STATUTE IS UNIQUE

Louisiana is the only state which has a statute permitting the injured person to file a direct action *et law*, against a liability insurer *alone*, where the policy was *voluntarily* obtained by the insured. Appellants, on page 20 of their brief, refer to statutes of fifteen other states and claim that these statutes are "somewhat similar" to the Louisiana statute involved. The statutes referred to, with the exception of Rhode Island and Wisconsin, deal with the rights of an injured party to proceed *in equity* against

the insurer, or his rights of action under a *required or compulsory* liability policy, usually covering motor vehicles. They have no application whatever to this case, where the action would be tried at law before a jury and the insurance policy was voluntarily obtained by the insured. The statutes of Rhode Island and Wisconsin, although similar in many respects to the Louisiana statute, require the *joinder* of the insured in any action against the insurer. It is especially persuasive that the Supreme Courts of both Rhode Island and Wisconsin have held that their direct action statutes cannot be given extra territorial effect without violating the constitutional provisions relied upon by appellee in this case. The jurisprudence of Rhode Island is evidenced by the cases of *Coderre v. Travelers Insurance Co.*, 48 R. I. 152, 136 A. 305, and *Riding v. Travelers Insurance Co.*, 48 R. I. 433, 138 A. 186. The most recent decision on the subject by the Supreme Court of Wisconsin is *Ritterbusch v. Sermith*, 256 Wis. 507, 41 N. W. (2d) 611, 16 A. L. R. (2d) 873 which directly supports the position of appellee herein, wherein the Court said:

"The policy stands, then, as a contract made in Massachusetts whose obligations are established and to be construed by the effect which Massachusetts law gives them. It is conceded that in that state the no action clause is valid. This being so, it secured to the insurer a valuable contractual right and an application of Sec. 260.11 (1) of the Wisconsin Statutes (Wisconsin's direct suit statute) at the time of performance would impair that right and is thus forbidden by Section 10, Article 1 of the United States Constitution."

THE PUBLIC POLICY OF MASSACHUSETTS AND ILLINOIS TO PROTECT THE CONTRACTING PARTIES OUTWEIGHS THE ALLEGED PUBLIC POLICY OF LOUISIANA TO PROTECT THIRD PARTIES.

Appellants contend that it is the public policy of Louisiana to protect the injured person and, therefore, the valid no action provision of the Massachusetts contract should not apply. The mere statement that it is Louisiana's public policy to protect the injured person is overcome by the fact that Louisiana does not require manufacturers to carry compulsory liability insurance of any kind. In the absence of compulsory insurance, many Louisiana citizens may be injured without recourse against an insurer, but that apparently is of no concern to the Louisiana Legislature. In *Ritterbusch v. Sermith*, supra, the Supreme Court of Wisconsin said:

"Everyone who has a driver's license is at liberty to run his car upon the highway without any insurance whatever. If he may do this it seems clear that he may buy whatever insurance he pleases and if what he may buy in Wisconsin does not please him he may look elsewhere. If, then, he brings from another state what may legally be sold to him there we see no public policy against it even though such insurance may not be as beneficial to an injured person as the sort sold here. In the absence of compulsory insurance of a prescribed kind the Wisconsin automobilist has the right to obtain what he likes or none at all and he does not bring into the state for the benefit of the plaintiff more than he purchased."

In addition, the Louisiana Supreme Court, in *Davies v. Consolidated Underwriters*, 199 La. 459, 6 So. (2d) 351, 357, has recognized that "rarely has the injured party knowledge as to who may be the insurer of the party responsible for his injuries". The Gillette Company and the Toni Company, non-residents of Louisiana, did not have to be insured at all. They voluntarily purchased in Massachusetts a contract to indemnify themselves against loss, but that is of no concern to Louisiana.

The making or enforcement of a contract of insurance of the kind involved in this case is not against the public policy of Massachusetts.²¹ Indeed, as above pointed out, it is the public policy of forty-four states, including Massachusetts, to protect the actual parties to a contract of liability insurance, to give full validity to the no action clause, and to avoid prejudice by keeping any knowledge of the defendant's insurance from the jury. It has been recognized that, despite the absence of a no action clause from the insurance contract, it is against public policy to permit the insurer to be joined in the negligence action.²²

The policy policy of Massachusetts to protect parties to the contract outweighs the alleged public policy of Louisiana to protect third parties.

21. *Miller v. United States Fidelity & Guaranty Co.*, 291 Mass. 445, 197 N. E. 75, 78.

22. F. N. Appleman, "Automobile Liability Insurance", page 306; *Hertz v. Hudson Motor Car Co.*, 8 F. R. D. 431, and *Pitcairn v. Rumsey*, 32 F. Supp. 146.

THE APPELLANTS' CASES

In *Washington ex rel Bond & G. & T. v. Superior Court*, 289 U. S. 361, 77 L. Ed. 1256, 53 S. Ct. 624, this Court said:

"It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights * * *. And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission."

(Citing *Power Mfg. Co. v. Saunders*, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678).

In the above case, the statute merely required the corporation on withdrawal to leave an agent for service of process in the state until the statute of limitations had run. This Court said that "the provision that the liability thus to be served should continue after withdrawal from the State afforded a lawful and constitutional protection of persons who had *there* transacted business with the appellant." No question of extra territoriality of the statute was involved.

Hoopeston Canning Co. v. Cullen, 318 U. S. 313, 87 L. Ed. 777, 63 S. Ct. 602, involved reciprocal insurance associations which insured *immovable property* located in New York against fire and related risks. Although the policies were issued in Illinois, this Court held that New York regulations applied because the insured's interest was located in the state and said that "contracts formally made in other states may remain subject to the law of the

state of the situs of the property, particularly in respect to immovables" (318 U. S. 313, 318, 87 L. Ed. 777, 783, 63 S. Ct. 602). This Court recognized that the rule would not apply where the state had no actual contact with the insurance contract, the property insured was elsewhere, and the contract was made elsewhere, citing *Home Ins. Co. v. Dick*, *supra*.

California Auto. Ass'n. v. Maloney, 341 U. S. 105, 95 L. Ed. 788, 71 S. Ct. 601, involved the validity of a compulsory assigned risk law providing for apportionment among automobile insurers of applicants for local insurance, who could not obtain policies through ordinary methods. This Court upheld the law on the theory that the local needs should be serviced by insurers and emphasized the interest of the state in clearing the highways of irresponsible drivers and in trying to control highway accidents. The case is confined to local compulsory automobile insurance, does not deal with the extra territoriality of the statute, and is not applicable to the facts of the present case.

In *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, this Court held that the systematic and continuous activities of a shoe company in the State of Washington established sufficient contacts with the state of the forum to make it reasonable to permit the state to enforce the obligations which the shoe company incurred *there*. It did not hold that obligations incurred elsewhere could be enforced in Washington by the same method.

In *Griffin v. McCoach*, 313 U. S. 498, 85 L. Ed. 1481, 61 S. Ct. 1023, this Court, in remanding the case to the Court of Appeals, recognized that if the Court of Appeals was correct in its view that the Federal Constitution foreclosed application of a local public policy to a foreign contract, the only question to be decided would be whether the contract sued upon was a local contract.

In the case *Alaska Packers Ass'n. v. Industrial Accident Commission*, 294 U. S. 532, 79 L. Ed. 1044, 55 S. Ct. 518, this Court held that where a contract was entered into in California, even though it was to be performed elsewhere, its terms, its obligation and its sanctions were subject, in some measure, to the legislative control of California. The fact that the contract was to be performed elsewhere did not put these incidents beyond reach of the power which California could constitutionally exercise. The case supports appellee's position and is authority for the proposition that the valid no action clause in the Massachusetts contract here involved should be enforced in Louisiana. With reference to the validity of the Louisiana direct action statute, the following statement by this Court (294 U. S. 532, 540, 79 L. Ed. 1044, 1048, 55 S. Ct. 518) is applicable:

"The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction. *New York L. Ins. Co. v. Head*, 234 U. S. 149, 162-164, 58 L. Ed. 1259, 1264-1266, 34 S. Ct. 879; *New York L. Ins. Co. v. Dodge*, 246 U. S. 357, 377, 62 L. Ed. 772,

783, 38 S. Ct. 337, Ann. Cas. 1918E, 593; *Home Ins. Co. v. Dick*, 281 U. S. 397, 407, 408, 74 L. Ed. 926, 933, 934, 50 S. Ct. 338, 74 A. L. R. 701; compare *National Union F. Ins. Co. v. Wanberg*, 260 U. S. 71, 75, 67 L. Ed. 136, 138, 43 S. Ct. 32. Similarly, a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 348, 67 L. Ed. 297, 298, 43 S. Ct. 125; *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U. S. 87, 75 L. Ed. 177, 48 S. Ct. 100."

The present case does not involve insurance on automobiles or immovable property located in Louisiana. It does not involve insurance obtained under a state compulsory insurance statute, nor the validity of an insurance contract entered into in the State of Louisiana. On the issues presented, the foregoing authorities actually support appellee's position.

CONCLUSION OF ARGUMENT ON THE MERITS

Louisiana Act 541 of 1950, by providing for a direct action against the insurer "whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action", is directed not at the regulation of insurance within the State but at the making of contracts without. Louisiana has no power to

regulate or abrogate provisions in the contract of insurance here involved, validly made outside her borders, because the Federal Constitution and Congress, in enacting the McCarran Act, have placed control elsewhere.

The statute, in attempting to give Louisiana control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into Louisiana contracts, violates the due process provisions of the Federal Constitution. Louisiana's connection with the insurance contract in this case is slight. None of the contracting parties are citizens of Louisiana, performance there is not contemplated, and the risk, being for indemnity conditioned upon a final judgment against the insureds, is not located there. The Louisiana statute cannot impair the obligations of a contract validly made in Massachusetts. Full faith and credit must be given to the statutes and jurisprudence of Massachusetts. The insurer cannot be subjected to bias and prejudice by trial before a jury under the circumstances without depriving it of equal protection of the laws.

Since Act 541 of 1950, if applicable, is unconstitutional, Act 542 of 1950, forcing the insurer to sign a consent agreement to the direct action, is equally unconstitutional.

The judgments of the courts below in this case, and in the seven companion cases referred to at the outset of

this brief, correctly hold that if Acts 541 and 542 of 1950 are applicable under the circumstances presented here, they violate the provisions of Section 1 of the Fourteenth Amendment (Due Process and Equal Protection clauses), Article I, Section 10 (the Contract clause), and Section 1 of Article IV (the Full Faith and Credit clause), of the Constitution of the United States.

The judgment appealed from should be affirmed.

Respectfully submitted,

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APPENDIX A

ACT 253 of 1918 OF STATUTES OF THE STATE
OF LOUISIANA

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and, in case of such insolvency or bankruptcy, an action may be maintained within the terms and limits of the policy by the injured person or his or her heirs, against the insurer company.

Section 2. Be it further enacted, etc., That the issuance of any policy against liability which does not contain the clause above specified shall be a misdemeanor, punishable by a fine of not less than fifty dollars (\$50.00) and not more than five hundred dollars (\$500.00) or imprisonment of not less than one month and not more than twelve months, or both at the discretion of the Judge.

Section 3. Be it further enacted, etc., That this Act shall take effect and be in force from and after October 1, 1918.

Section 4. Be if further enacted, etc., That all laws or parts of laws in conflict herewith be and the same are hereby repealed."

APPENDIX B

ACT 55 OF 1930 OF STATUTES OF THE
STATE OF LOUISIANA

Section 1. Be it enacted by the Legislature of Louisiana, That the title of Act 253 of 1918 be amended and re-enacted so as to read as follows:

An Act providing that no policy against liability shall be issued unless it contains a proviso that the insolvency or bankruptcy of the assured shall not release the company from liability for injury sustained or loss occasioned during the life of the policy; prescribing what shall constitute prima facie evidence of insolvency; providing for direct action within the terms and limits of the policy by the injured person, his or her heirs, and the place where such action may be brought; and providing a penalty for the violation of this act.

Section 2. That Section 1 of Act 253 of 1918 be amended and reenacted so as to read as follows:

Section 1. That, after the passage of this act, it shall be illegal for any company to issue any policy against liability unless it contains a provision to the effect that the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and any judgment which may be rendered against the assured, for which the insurer is liable, which shall have become executory, shall be deemed prima facie evidence of the insolvency of the assured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer company. Provided further that the injured

person or his or her heirs, at their option, shall have a right of direct action against the insurer company within the terms, and limits of the policy, in the parish where the accident or injury occurred, or in the parish where the assured has his domicile, and said action may be brought either against the insurer company alone or against both the assured and the insurer company, jointly or in solido.

Provided that nothing contained in this act shall be construed to affect the provisions of the policy contract if the same are not in violation of the laws of this State.

It being the intent of this act that any action brought hereunder shall be subject to all of the lawful conditions of the policy contract and the defenses which could be urged by the insurer to a direct action brought by the insured; provided the terms and condition of such policy contract are not in violation of the laws of this State."

APPENDIX C

ACT 211 OF 1946 OF STATUTES OF THE STATE OF LOUISIANA

AN ACT

Authorizing and directing the Secretary of State to prepare a draft or project of an Insurance Code for the State of Louisiana; providing the manner and time of submitting the said draft; prescribing the method of considering, adopting, enacting and printing said Insurance Code; and providing for the payment of the expenses incident to the execution of this Act.

Whereas, the United States Supreme Court, in the case of United States v. Southeastern Underwriters Association, et al., 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1446, has held that the business of insurance is interstate commerce, and, as a result, the 79th Congress of the United States has passed Public Law 15 suspending the operation of certain federal statutes until January 1, 1948, and otherwise preserving to the respective States the power and authority to continue to regulate and tax the business of insurance, all of which has caused innumerable problems to arise in connection with the validity, interpretation and administration of state insurance laws; and

Whereas, the laws pertaining to the subject of insurance in this state have been enacted by various Legislatures from 1855 to the present date, many without relation to others on the same subject, thereby causing confusion and ambiguity; and

Whereas, the subject of insurance is one of great importance and of great public interest; and

Whereas, it has been the experience of a number of other states that an Insurance Code is the most effective means of obtaining clarity of purpose and the efficient operation of insurance laws; Now, Therefore,

Section 1, Be it enacted by the Legislature of Louisiana, That the Secretary of State is hereby authorized and directed to make a survey of the Insurance Codes of other states now in force, and of the insurance laws in effect in this state, and to draft therefrom an Insurance Code to be presented to the 1948 Regular Session of the Legislature for its consideration.

Section 2. That the sum of Ten Thousand Dollars (\$10,000.00) per annum, or as much thereof as may be necessary, be withheld and expended by the Secretary of State from the fees collected by his office and paid by insurance companies to defray the expenses incurred in the preparation of said Insurance Code.

Section 3. That the definitive draft of said Insurance Code, as finally approved and recommended by the Secretary of State, together with an explanatory statement and notes, shall be printed and distributed to the Governor, the Attorney General, and the Legislature not later than April 10, 1948.

Section 4. That the Legislature of Louisiana of 1948 shall have the power to consider the Insurance Code of the State of Louisiana and to draft and enact an Insurance Code for the State of Louisiana, as an act of the Legislature, in the usual manner of enactment of laws, as provided in the Constitution, and, if adopted, to print and publish the said Code in book form, in a separate volume under the title "Insurance Code of Louisiana", without including the same in full in the published volume, containing the Acts of the Legislature of 1948; provided, however, that said published volume of the Acts of the Legislature of 1948 shall contain a reference to said Insurance Code by the number and title of the act by which enacted.

Section 5. That the Secretary of State is authorized to employ such persons as are necessary to carry out the provisions of this act and to fix the compensation of technical, professional and clerical employees as needed to complete the work, and that the employees provided for herein shall be subject to the Louisiana Civil Service Laws, rules and regulations.

APPENDIX D

SECTION 14.45 OF ACT 195 OF 1948 OF STATUTES
OF THE STATE OF LOUISIANA (THE
LOUISIANA INSURANCE CODE)

"No policy or contract of liability insurance shall be issued or delivered in this State, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. Nothing contained in this section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

APPENDIX E

TITLE 22: SECTION 655, LOUISIANA REVISED
STATUTES OF 1950

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person, or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly or in solido. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

APPENDIX F

ACT 541 OF 1950 OF STATUTES OF THE
STATE OF LOUISIANA

AN ACT

To amend and reenact Section 655 of Title 22, Louisiana Revised Statutes of 1950 to provide that the right of direct action in favor of an injured person or his or her heirs against the insurer shall exist whether the policy of insurance was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana.

Section 1. Be it enacted by the Legislature of Louisiana that Section 655 of Title 22, Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

Section 655. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed

prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.

Section 2. All laws or parts of laws in conflict herewith are hereby repealed.

APPENDIX G

ACT 542 OF 1950 OF STATUTES OF THE
STATE OF LOUISIANA

AN ACT

To amend Section 983 of Title 22, Louisiana Revised Statutes of 1950 by adding thereto a provision that no certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer has consented to be sued by the injured person or his or her heirs in a direct action, whether the policy was written or delivered in Louisiana or not, and whether or not the said policy contains a provision forbidding such direct action, provided the accident occurred within the State of Louisiana.

Section 1. Be it enacted by the Legislature of Louisiana that Section 983 of Title 22, Louisiana Revised Statutes of 1950 is hereby amended to add after Subsection "D" a new subsection to be captioned subsection "E" and to read as follows:

E-- No certificate of authority to do business in Louisiana shall be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. The said foreign or alien insurer shall deliver to the Secretary of State as a condition precedent to the issuance of such authority, an instrument evidencing such consent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX

Appellants

vs.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL.**

Appellee

PETITION FOR REHEARING

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B. CLINTON WATSON, ET UX

Appellants

vs.

**EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., ET AL.**

Appellee

PETITION FOR REHEARING

Appellee, Employers Liability Assurance Corporation, Ltd., prays that this Court grant a rehearing of its decision of December 6, 1954, reversing the judgment of the Lower Court, and further prays that, upon rehearing, the judgment below be affirmed.

REASONS FOR GRANTING A REHEARING

Your petitioner shows that the opinion and decision in this cause, rendered on December 6, 1954, sets forth precedents of such grave consequence in the field of contracts and conflict of laws as to warrant further consider-

ation on rehearing. Up to this time, an existing contract, valid and legal where made, has been upheld by this Court as valid elsewhere. The principles of freedom of contract and the sanctity of existing legal contracts have been rigidly protected. Whereas it has been recognized that a state might deny enforcement of a foreign contract in its courts when such contract offended local policy, this Court has never before permitted a State, on the grounds of public policy or otherwise, to re-write a contract, make it different and more onerous than the one validly entered into outside her borders, and then enforce the new product for the benefit of her own citizens, not even parties to the contract.

The underlying principle of Workmen's Compensation, that industry should bear the burden of injuries to workmen, does not apply to insurance. This Court has recognized that insurance is a business affected with a public interest, upon the theory that an insurance company is the stakeholder of the funds of its millions of policy holders, the losses of a few being spread over the shoulders of the public at large. Accordingly, this Court, with reference to insurance companies, has said:

"Their efficiency, therefore, and solvency, are of great concern." *German Alliance Insurance Company vs. Lewis*, 233 U. S. 389, 412, 413.

Mr. Justice Black, speaking for the majority of this Court, in holding that the business of insurance is interstate commerce, said:

"Individual policy holders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies." *United States v. Southeastern Underwriters Association*, 322 U. S. 533, 541.

Whereas the power of Louisiana to regulate its local insurance business has been recognized, Louisiana should not be permitted to tap and drain off the funds of the *national* insurance market, funds obtained through premiums paid for contracts elsewhere validly consummated, for the economic protection of its own third-party citizens at the expense of citizens of other states who contributed to the fund and who are not afforded equal protection.

Your petitioner, in its brief on the merits (pages 17-20), has demonstrated that in forty-four of the states, a direct action against the insurer is not permitted and the mention of insurance in a negligence action is reversible error. The jury's knowledge of the existence of insurance increases the award and tends to obscure the real issues in the case. The Louisiana Direct Action Statute increases the liability of the insurer in other ways, as clearly as if the statute increased the stated amount of coverage in the policy. By waiving the requirement of a final judgment against the insured, the injured party is permitted to recover from the insurer in many instances in which he could not obtain a judgment against the insured. This is well demonstrated by the following

statements of the Louisiana Supreme Court in the case of *Edwards v. Royal Indemnity Company*, 182 La. 171, 161 So. 191:

"Let us suppose, in the instant case, that the insured had been a minor twenty years of age or an interdict. No action could have been maintained against him, but, certainly, the injured party could sue the insurance company which could not plead the minority or interdiction of the insured as a defense."

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"It appears that the theory of the articles of the Civil Code and Code of Practice, which prohibit the wife from suing her husband during marriage, except for divorce, separation, etc., is that litigation between them would tend to promote domestic troubles and unhappiness, as well as confusion in the finances of the family group. But these reasons were entirely eliminated from consideration when the Legislature created a direct right of action in favor of the claimant against the insurance company alone."

The Louisiana statute changes the fundamental nature of the insurer's liability from one of indemnity to its insured to one of direct liability to the injured third-party. In operation, this results in loss of personal defenses against the insured, such as failure to receive prompt notice of the accident. In *West v. Monroe Bakery*, 217 La. 189, 46 So. (2d) 122, the Louisiana Supreme Court has held that failure of the insured to give notice to the insurer cannot deprive the injured party of the right of direct action which enured to his benefit upon the happening of an accident. In fact, any personal defenses

between the insurer and the insured cannot defeat the injured party's claim. Accordingly, the Louisiana statute not only invalidates the "no action" provision of the policy, but also nullifies Conditions 9, 10 and 11 of the policy (R. 57), providing for prompt notice of the accident, immediate notice of a claim or suit, and assistance and cooperation of the insured. An insurance company's rights to receive prompt notice of the accident and any claims resulting therefrom, to enforce cooperation and assistance of the insured, to postpone liability until judgment has been obtained against the insured, and to insure impartial determination of liability before a jury without the insurer present, have been repeatedly upheld in at least forty-four of the states. The due process clause of the Constitution assures that no state has the power to deprive any citizen of such substantive rights acquired from contracts elsewhere validly made.

With reference to the problem of balancing interests under the full faith and credit clause of the Constitution, it is submitted that the interests of the State of Massachusetts in protecting the solvency and efficiency of insurance companies, as stakeholders of public funds, outweighs the interests of the State of Louisiana in protecting the *financial* well-being of its own citizens, including its doctors and hospitals. This Court, in its opinion of December 6, 1954, has emphasized the interest of Louisiana in providing for the "recovery of damages" by third-party injured persons. Obviously, the Louisiana statute does not protect citizens of Louisiana from injury nor does it tend to decrease accidents. The statute is

simply designed to assure the payment of money by the insurer. Viewed in this light, it is not possible to distinguish this case from the case of *Hartford Accident & Indemnity Company v. Delta & Pine Land Company*, 292 U. S. 143. The "casual payment of money in Mississippi" referred to in that case (292 U. S. at page 150) is no different from the payment of "damages" referred to in the present case. In the *Hartford* case, the suit was between the actual parties to the contract. In this case, the suit is between one of the parties and an outside third party in direct violation of the admittedly valid terms of the contract. It would appear that the *Hartford* case is directly in point and should control.

The power of a state to regulate insurance corporations doing business therein is well recognized, but such regulation should be limited to the state in which the insurance policy is written, the amount of premiums computed, and the losses adjusted. Dual or multiple regulations of insurance contracts by several states cannot be permitted without seriously affecting their efficiency. For this reason, Congress expressly intended to limit the power of states in this respect in the passage of the McCarran Act. The House Report on the Bill, quoted on page 36 of appellee's brief on the merits, is squarely in point and expresses clear congressional intent to prohibit any state from regulating contracts validly entered into in other states. That report was considered by this Court to be "decisive" in the recent case of *Maryland Casualty Company v. Cushing*, 347 U. S. 409, 413. It should be equally decisive of the present case. Louisiana cannot

exercise greater powers than have been conferred upon her by Congress in the McCarran Act without being guilty of placing an unconstitutional burden on interstate commerce by this regulation of foreign insurance contracts.

Your petitioner, in its brief on the merits, emphasized the fact that the insured in this case is not qualified to do business in Louisiana to clearly show that Louisiana's connection with the insurance policy is slight. It is true that the Louisiana statute provides a convenient forum for the trial of claims by Louisiana citizens, but it would appear that the interests of the State of Illinois in requiring that its citizens be sued at their domiciles would outweigh the interests of Louisiana in this respect. The opinion of this Court does not take into consideration the fact that even though a foreign insured is qualified to do business in the State of Louisiana and has an agent for service of process there, nevertheless the injured party invariably joins the insurer as a party to the suit or elects to sue the insurer alone to gain the manifest advantage arising from the prejudice of juries toward insurance companies. Any serious disadvantage to Louisiana citizens in obtaining judgment against a foreign assured would seem to be overcome by the provisions of Section 1404 (a), 28 U. S. C. (incorporating the doctrine of Forum Non Conveniens). In the absence of a policy of liability insurance, this Court clearly would not hold that Louisiana could subject a citizen of Illinois to trial in Louisiana courts simply because loss under a contract happened there. In that situation, however, the interests of Louisiana would appear to be the same.

The fact that your petitioner was forced to comply with the Louisiana "Consent" Statute does not provide a sound basis upon which to rest the decision of this Court. Since the Direct Action Statute does deprive the insurer of property without due process of law and does violate the full faith and credit clause, any attempt to apply the "test of reasonableness" in this situation would be incongruous. Obviously, the deprivation of any Constitutional right is unreasonable. Your petitioner's position in this respect is well stated in the minority opinion of Mr. Justice Day in the case of *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 244, 266, 267, in the following language:

"If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the state may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation: 'You may do business within this state, provided you will yield all right to be protected against deprivation of property without due process of law, or provided you surrender your right to have compensation for your

property when taken for private use, or provided you surrender all right to the equal protection of laws,' and so on through the category of rights secured by the Constitution, and deemed essential to the protection of people and corporations living under our institutions. *This dangerous doctrine*, asserted in the majority opinion in the *Doyle* case, destroyed and overthrown, as we think, in *Barron v. Burnside*, which latter case has been consistently and repeatedly followed in this court and in other courts, Federal and state, from that day to this, *ought not now to be rehabilitated and restored to its power to work destruction of rights deemed essential to the safety of citizens, natural and artificial, that they have been secured by the provisions of the Federal Constitution.*"

In *Terral v. Burke Construction Company*, 257 U. S. 529, 533, the Court stated that *Security Mutual Life Insurance Co. v. Prewitt*, *supra*, was overruled and that the views of the minority judges in that case have become the law of this Court. The cases of *Aetna Life Insurance Co. v. Dunken*, 266 U.S. 389, and *New York Life Insurance Co. v. Head*, 234 U.S. 149, 163, are closely analogous to the present case.

The Louisiana Direct Action statute, in addition to depriving the insurer of property without due process of law, burdensomely regulates interstate commerce and projects its powers into the domain of other states, as above demonstrated. Accordingly, even under the standard of reasonableness, the "Consent" Statute is equally unconstitutional.

CONCLUSION

For the foregoing reasons, Employers Liability Assurance Corporation, Ltd., prays that this petition for rehearing be granted and that upon rehearing, the judgment of the Lower Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that the same is filed pursuant to Rule 58 of the Rules of this Court.

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